J. Brown
D. Burns
W. Lumry

IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 00-03153 CA 32

SUZETTE A. JANOFF,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."),
R.J. REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and
BROWN & WILLIAMSON TOBACCO CORP.,
Individually and as Successor
to THE AMERICAN TOBACCO COMPANY,

Defendants.
_____/

VOLUME 7

PROCEEDINGS BEFORE THE
HONORABLE LESLIE ROTHENBERG
on Monday, August 26, 2002
1:53 p.m. - 5:26 p.m.

APPEARANCES:

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I N D E X

E X H I B I T S

PROCEEDINGS

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(Back on the record at 1:53 p.m.)

THE COURT: Do we have all the parties here on the Janoff case? Mr. Williams is missing.

Okay. I did review the objections to the testimony of Jason Brown, however, I don't have enough relevant information to be able to rule.

I need to ask a lot of questions and perhaps review his testimony. Initially let me ask this: What type of airlines -- I know that the plaintiff flew on American Airlines, but what type of aircraft did she fly on?

MR. HUNTER: She flew on the two airplanes that overlapped, are the 727 and the Super 80, which she flew on a lot. She flew on the DC9 which is essentially the same airplane.

THE COURT: As the Super 80?

MR. HUNTER: Yes.

THE COURT: And the 727, he flew 747s or did he fly --

MR. HUNTER: No, 727.

THE COURT: 727s as well.

MR. HUNTER: And I will establish substantial similarity through this witness. This is the kind of thing that I think should be taken up in front of the jury just like an ordinary trial. I'll lay my predicate as I go.

THE COURT: He's going to be testifying live; this is not videotaped testimony?

MR. HUNTER: Yes.

MR. UPSHAW: Right. Your Honor, I understand that in the normal course we would obviously lay the predicate and I'm sure that Mr. Hunter will do that and I'll object at the appropriate time. There are two areas that I don't think he should be and he's listed as a fact witness. So he should not be discussing obviously his own health. That was questioned in his deposition. That was agreed to --

THE COURT: He has some health issues.

MR. UPSHAW: He has his own health issues. I don't know whether or not they're related to his flying or issues of that nature. They were brought up during the

deposition, and Mr. Gerson, who defended the deposition on behalf of the plaintiffs in that particular case said we could not go in that area, so I just don't want those issues to come up. I'm not sure if they even are.

THE COURT: Mr. Weinstein, are you --

MR. WEINSTEIN: No.

THE COURT: You're standing there. If you're standing there, you're going to get --

MR. WEINSTEIN: Yes, that's true. I was --

MR. UPSHAW: And if --

THE COURT: Mr. Hunter, do you intend to elicit any testimony from him as to his own health conditions?

MR. HUNTER: No, only as to his perceptions.

MR. UPSHAW: Right, I think he's just --

MR. HUNTER: And he described --

THE COURT: So that's granted. What else? I know you had also objected to him testifying, however, the Court finds he is added due to the late adding of the affirmative defense which listed American Airlines as a Fabre defendant.

MR. UPSHAW: Judge, just for clarification, he was not added for that purpose. He was added late before the whole issue of affirmative defenses came up.

MR. WEINSTEIN: Well, that also shows prejudice under the Binger case, so on and so forth, and they've not only deposed him but also they each testified in the last trial. But, Judge, I think basically what they're saying was and I know you have that in your mind because whether the planes were exactly the same or whatever.

THE COURT: You're going to have to establish a proper predicate for his knowledge as to the type of aircraft that the plaintiff flew on.

MR. WEINSTEIN: May I respectfully call to the Court's attention that we don't have to because of the Broin decision.

The Broin decision established as a matter of law that there was a commonality, and they address it, because you see, in the Broin decision, it's called typicality, and commonality.

And they say -- they rule as a matter of

law, we are certifying it because all of the airline attendants were subjected to the same or similar circumstances and the conduct of the defendants are basically the same.

In fact, they say when they certified it, the case, they say it demonstrates that the alleged facts, which we accept as true, demonstrate that the members of the class behaved in the same way that they were passive inhalers of the secondhand smoke and that the defendants acted toward each member in a similar manner by manufacturing the cigarettes that exuded the smoke.

The class members all seek recovery under the same common interest and share of common interest in obtaining the relief sought. Plaintiffs must merely establish a common claim arising from the same practice or course of conduct that gave rise to the remaining claims and based upon the same legal theory.

They then go on, and they have a separate section called in the decision -- called typicality plaintiffs allege their claims are identical to the claims of other

class members.

They also sustained injuries from inhaling secondhand cigarette smoke. All class members seek the same remedy.

The mere presence of factual differences will not defeat typicality, and they also say the complaints maintain the defendants -- the defense will assert a common if not identical defenses to the plaintiff's claim.

THE COURT: Say that again. Go slower right there.

MR. WEINSTEIN: Moreover the complaint maintains that the defendants will assert common if not identical defenses to the plaintiff's claim, a factor that bolsters class action treatment.

All the allegations stem from similar conduct by plaintiffs and by the defendants. There is no reason to conclude that representation will be inadequate. So this is the Broin decision, and if I could hand --

THE COURT: Yes, I understand that but that's somewhat different because this is a different defendant. It is not the tobacco companies.

It is a Fabre defendant which is American Airlines, a defendant that's not common to all of the plaintiffs in the class action.

MR. WEINSTEIN: I understand that, Judge, but what I am -- I thought that they were complaining -- I heard them say something about the airplane that he was on may have differed a bit or whatever.

And that's what I'm addressing there because it's the same smoking conditions, and that's what they -- the issue they raised a few moments ago before Mr. Brown testifies.

MR. KODSI: Your Honor, I can briefly respond to that because I think this fits in with Anita Leone, who is a flight attendant they want to bring this afternoon although he read it quickly, he said the mere presence of factual differences do not effect typicality.

It doesn't affect typicality under the class action law. But under the law they have to provide here, it does affect that analysis, and they do have factual differences.

I think Your Honor may have stepped out during the Richmond video, but one of the things even Dr. Richmond has just testified to in front of this jury is that flight attendant exposures depend on a number of variables, the number of smokers, the proximity to smokers, the type of airplane, the ventilation in the airplane, whether it's 100 percent ventilation or recirculation. Some planes are different from others.

If they can bring in a flight attendant who flew with Ms. Janoff on American Airlines that was there to see what she saw, that's one thing.

Also the case law we provided Your Honor, Ms. Janoff is here. She's here to testify about what the flight conditions were like on her airplanes.

THE COURT: I don't find it cumulative being that she's the plaintiff and has an arguably bias in her testimony, so having a neutral person testify is certainly not cumulative.

MR. KODSI: Your Honor, we would just contend at this point is that testimony from

Mr. Brown and Ms. Anita Leone are not substantially similar fact patterns. They can't establish that predicate.

THE COURT: I think we'll have to wait and see. I'll allow you to put them on and you'll have to establish the proper predicate in the testimony.

Okay. Are we ready for the jury?

THE BAILIFF: The technician needs two seconds to adjust the audio levels.

THE COURT: Who is going to be the first witness? Who is going to be the first witness this afternoon?

THE BAILIFF: Mr. Hunter.

MR. WILLIAMS: The first witness?

MR. HUNTER: Mr. Jason Brown.

Judge, for my ease of presentation, do I understand that you have admitted these photographs that the clerk -- I'm now having the clerk mark these for ID, but have you admitted the photographs that were discussed in the -- or will you admit the photographs that were discussed in the testimony of Hugh Fulton in the deposition?

THE COURT: Any objection by the

defense? Show them which photographs --

MR. UPSHAW: We object, Your Honor. It was objected to in the Fulton deposition as well. He won't be able draw -- we object on predicate terms and foundation. I mean if he can lay the appropriate foundation that this guy took the photographs and --

THE COURT: He doesn't have to take the photographs. He has to be able to testify that they substantially reflect whatever it is --

MR. UPSHAW: Whatever it is they reflect.

THE COURT: Whatever they reflect. I don't know. So they won't get admitted at this point. We'll see whether they come in. You can mark them for identification.

MR. HUNTER: All right. I can lay a predicate. This is why I asked. I can lay a predicate with this witness, but I didn't want to spend any more time doing that if you've already determined that these photographs come in through the video deposition of Hugh Fulton.

THE COURT: I haven't made that

determination. I didn't in any way focus on the photographs and I didn't have them to look at during the deposition, so I didn't rule on those objections.

MR. HUNTER: Okay.

THE BAILIFF: Are you ready, Judge?

THE COURT: I believe so.

Are we ready?

Yes.

THE BAILIFF: Rise for the jury, please.

(The jury entered the courtroom.)

THE COURT: Thank you. You may be seated. For the record, the jury is now present. Plaintiff, you may call your next witness.

MR. HUNTER: Thank you. At this time we would call Mr. Jason Brown.

THE BAILIFF: Let the clerk swear you in, sir.

MR. BROWN: Hi.

THE CLERK: Sir, if you'd raise your right hand, please. Do you solemnly swear or affirm that the testimony you shall give in this cause shall be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. HUNTER:

Q. Good afternoon, could you tell the ladies and gentlemen of the jury your name and address?

A. My name is Edward Jason Brown. I live at [DELETED]

Q. Mr. Brown, could you tell the jury generally your experience with regard to airplanes?

A. Well, I started flying when I was about three years old, dreaming how I was going to be a pilot, and then I pursued my dream and was able to see that dream come through.

In the Air Force, I was an aircraft mechanic responsible for the maintenance, preventive maintenance, and overall flying conditions of that airplane.

After the Air Force, I joined the United States Army, where I was an Army warrant officer. I flew helicopters and airplanes.

I was a flight instructor, a maintenance officer, a test pilot, and after the Army, I got

out of the Army and got hired by the airlines.

And I -- well, prior to the airlines, I was a police officer with the Decatur County Police Department. I was an aerial attack assault.

Q. What type of aircraft or airborne vehicles did you fly in the police department?

A. I flew Hughes 300 helicopters.

Q. And how long was your law enforcement career?

A. About four years. I was also a Fulton County Deputy Sheriff, and I work with security now.

Q. All right. Tell us about your career with the airlines, and what company -- companies you work for and what did you fly in the commercial aviation in industry?

A. I flew for Atlantic Southeast Airlines as a co-pilot on a 35-passenger airplane. We were the Delta connection. After that, I was hired by Republic Airlines, and then they merged with Northwest Airlines.

Q. And what years did you fly for Northwest?

A. '86 through 1995.

Q. All right. Could you tell us what types of aircraft you flew when you were flying for Northwest Airlines?

A. I flew the McDonnell Douglas DC9, all three models and the Boeing 727, when I was the flight engineer responsible for maintaining systems and in-flight operation, and the Conveyer 580.

Q. Tell the jury about the 727. What type of airplane is it in terms of how big is it?

A. Oh, the 727 holds about 144 passengers. If you look at that back wall there, back here, I'm sure it's a little bit longer than that, and it's about six seats across.

Q. And how about the DC9?

A. The DC9 was a little shorter and held 122 passengers, five seats across.

Q. Now the testimony in this case will be that Ms. Janoff spent time on the 727 as well as the Super 80. Is the Super 80 -- tell the jury how the Super 80 relates to the DC9.

A. Well, the Super 80 is a McDonnell Douglas extended to carry more passengers. It has the same systems, and the aircraft is taught simultaneously, DC9 pilots and Super 80 pilots.

Q. And when you say it's taught simultaneously, what exactly do you mean by that?

A. It's the same systems.

Q. All right. When you're learning to fly it, meaning they teach you the two airplanes together?

A. Yes.

Q. All right. I would like you, Mr. Brown, to tell us, were you flying for Northwest Airlines these two planes when smoking was permitted on the flights?

A. Yes, I was.

Q. And could you tell the jury in your own words what was the condition of the air cabin when smoking was allowed on these flights to your own observation, through your own eyes and nose and ability to perceive it?

A. Well, the cabin in basically all the airplanes was a smoke-filled environment. It was like a barroom. All you can see is smoke. And my eyes would water, and it bothered a lot of people, flight attendants, passengers.

One thing in a smoke-filled barroom, you can get up and walk around or leave.

MR. UPSHAW: Objection, Your Honor.

This is nonresponsive.

THE COURT: Sustained.

Q. (BY MR. HUNTER) Can you tell us what particular experiences you had where you would be in the cabin with the flight attendants as opposed to being up in the cockpit with the pilots particular experiences?

A. I'd be called to check out a condition on the aircraft, any complaints, of course, go to the restroom, and some maintenance procedures I was required to do.

Q. Now what about the ventilation system, how did that clear the smoke in the airplanes, these two planes to your observation?

MR. UPSHAW: Objection, Your Honor. Foundation.

THE COURT: Sustained, but I would ask that you separate the two.

MR. HUNTER: All right.

Q. (BY MR. HUNTER) On the 727, to your observation, how did the ventilation system of the airplane work as far as getting rid of the smoke in the cabin where the flight attendants were working?

MR. UPSHAW: Objection, Your Honor.

Same foundation.

THE COURT: Overruled.

THE WITNESS: The smoke remained in the cabin. The cabin is a sealed like a capsule environment. No outside air gets in. It produces the air and what's inside that cabin circulates and stays. I used a flashlight every time I went back.

Q. (BY MR. HUNTER) And what would you actually see with your eyes as you looked?

You say from me to -- from me where I am back here (indicating), to you may be the length of the plane. What would you see as you looked down that plane with your flashlight?

A. You'd see a lot of smoke. I'm glad we have lights and an exit sign. You can see the exit sign but not very much, but the smoke.

Q. With your maintenance responsibilities, did you have an observation to see what the smoke would do to the physical part of the airplane?

A. Yes.

Q. Can you tell us that?

A. It's my duty to make sure the aircraft is air worthy. I inspect the airplane. There's evidence on the outside skin of the airplane,

evidence along the side vents all along the cabin, brown stains. The pillows and the seats smelled of smoke and my clothes smelled of smoke.

Q. Now what did the smoke -- when you were in the cabin, what did it do to you, your senses? What did it -- how did it affect your ability to sense it?

A. Well, it distorted my sense of smell, and my eyes watered. I used to smoke.

MR. UPSHAW: Objection, Your Honor. Nonresponsive.

THE COURT: Sustained.

Q. (BY MR. HUNTER) All right. The amount of smoke that you would get physically to your senses on these planes, how -- have you finished describing it, or can you describe it better than --

MR. UPSHAW: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: As I'd walk through the cabin, my eyes would water, my nose would run. When I'd get back to the cockpit, I'd put on my oxygen mask. The pilots have oxygen masks available where we can use at any time, but it wasn't available in the

cabin.

Q. (BY MR. HUNTER) Now I have some photographs here that I'd like you to take a look at that have been marked by the clerk as Plaintiff's Exhibits -- let me show you 1E for identification.

MR. UPSHAW: Same objection as we discussed previous to this witness coming in. Foundation.

THE COURT: He's just identifying them. He's not admitting them at this point.

Q. (BY MR. HUNTER) Without exhibiting this to the jury, I wonder if you could take a look at Plaintiff's Exhibit 1E for identification. Do you recognize that photograph?

A. This looks like a cabin outflow port.

Q. All right. And you mentioned that there was something on the skin of the airplane on the exterior. Does this photograph accurately depict that condition?

A. Yes, it does.

MR. HUNTER: Your Honor, I would offer this as our next exhibit in evidence.

MR. UPSHAW: No objection.

THE COURT: It will be admitted.

MR. HUNTER: May I publish it at this point, Your Honor?

THE COURT: As soon as the clerk admits it.

THE CLERK: Plaintiff's 1 in evidence.

(Plaintiff's Exhibit No. 1 was received in evidence.)

Q. (BY MR. HUNTER) Let me show you another Exhibit, Mr. Brown, which has been marked as Plaintiff's 1F for ID. Can you recognize what is depicted in this photograph?

A. This is another cabin outflow vent.

Q. And does that accurately depict the condition that existed prior to the ban of smoking on airplanes?

A. Yes, it does.

MR. HUNTER: Your Honor, we would offer this as our next exhibit in evidence.

THE COURT: Any objection?

MR. UPSHAW: Yes, Your Honor. We'd like to discuss it.

THE COURT: On sidebar. Come sidebar.

(Whereupon, a sidebar discussion was had out of the presence of the jury.)

MR. UPSHAW: I let the first one go in,

but the problem I have with the second and the third and the fourth is we don't know what aircraft this is.

We don't know what this was. We don't know how long that vent had been that way. He hasn't laid the proper foundation. I don't know if this is an accumulation of over seven years or one month.

THE COURT: So what you're asking is this is a typical photograph of an aircraft. I guess he's already laid the foundation it was found on the aircraft. It's the condition of the aircraft during the time --

MR. UPSHAW: What aircraft?

THE COURT: Okay. Well, sustained.

MR. UPSHAW: When?

THE COURT: Well, he's already established when, but I think I would agree, is this the type of port on a DC9 or a Super 80, whatever is it or a 727. Is that the type of ports -- the type of conditions you saw and how often do we know if this conditions, is it typical of what you would see? I would agree.

MR. HUNTER: I mean the reason I was

trying to head this off is we know the type of plane this is.

THE COURT: You know but the jury doesn't know and I don't know.

MR. HUNTER: I'll go through it for --

THE COURT: All right.

(Whereupon, the sidebar discussion was concluded.)

Q. (BY MR. HUNTER) Mr. Brown, earlier you discussed -- you mentioned that when smoking was allowed on the planes that there was a brown stain on the outflow valves.

Now drawing your attention to this photograph, and yet, don't exhibit this to the jury yet, and let me hand it to you, does that photograph accurately depict an outflow valve either of a 727 or a DC9 or of an airplane substantially similar during the time frame meaning right prior to the smoking ban and I'll use 1988, '89, does that photograph accurately depict the type of condition at the airplane outflow valves that you discussed earlier in your direct testimony?

A. Yes.

MR. HUNTER: Your Honor, at this time we

would offer the photograph in evidence.

THE COURT: Any objection?

MR. UPSHAW: No objection, Your Honor.

THE COURT: It will be admitted.

THE CLERK: Plaintiff's 2 in evidence.

(Plaintiff's Exhibit No. 2 was received in evidence.)

Q. (BY MR. HUNTER) Now, Mr. Brown, I'm now showing these photographs to the jury. First I'm going to show them Plaintiff's 2 and Plaintiff's 1, and here is my question, after they have a little bit of time to look at this: When smoking was banned on the planes, did this condition persist?

A. No, they were clean after that.

Q. All right. Now, Mr. Brown, did Northwest Airlines, your employer, ban smoking?

A. Yes, they did.

Q. And do you recall what year that was?

A. 1988.

Q. All right. And what did the tobacco industry do in response to your company voluntarily banning smoking on airplanes?

MR. UPSHAW: Objection, Your Honor. Lack of foundation.

THE COURT: Sustain. Lay a proper predicate.

Q. (BY MR. HUNTER) At about that time, did you have an opportunity to see CNN and read the newspapers and see television concerning the subject of Northwest Airlines banning smoking?

A. Yes.

MR. UPSHAW: Your Honor, may we have a sidebar, please?

THE COURT: You may.

(Whereupon, a sidebar discussion was had out of the presence of the jury.)

MR. UPSHAW: Mr. Brown has identified -- you said we couldn't take his deposition because he testified in the French trial and the plaintiffs stated in open court that he wouldn't testify to anything more than what he testified to.

This is all a brand new area. We've never taken his deposition on any of this information. You didn't allow us to take his deposition on this information.

Mr. Hunter said he was only going to be a factual witness testifying as to what he observed in the planes and now he's going

into some area with regard to the tobacco industries' response to Northwest Airlines.

This is all brand new information and he shouldn't be allowed to testify in this regard.

THE COURT: Mr. Hunter.

MR. HUNTER: Judge, they brought out in their four-or five-hour deposition of this witness that Northwest voluntarily banned smoking because they didn't go further in asking what the response of tobacco was.

I mean in this case, I have said from the beginning that their response to Northwest Airlines is a pivotal issue that I'm going to prove.

There's no prejudice. There's nothing that -- there's no reason to preclude this witness from testifying as to what was in the popular media in response to Northwest's banning of the airplanes -- excuse me, Northwest's banning of smoking.

They went through this issue with him at his deposition. They brought it out at the last trial.

The only thing that's new is what did --

in response, did they do and that's only been -- this is the first time this issue has been in a trial.

MR. UPSHAW: Exactly, Your Honor. That's the whole point. This issue has never been in a trial so how could we have deposed him in the other trial to this issue.

They said we had an opportunity and it wasn't an issue in the trial. This issue was never covered in his deposition or in the trial.

He was asked did he know the date and that was the extent of it. Because he started flying in '86, so he flew in the aircraft which allowed smoking which was the point of the deposition, a couple years, although he flew a total of ten years commercial.

That was the gist of the live questioning and it had nothing to do with this issue and Mr. Hunter has just admitted this is brand new, and he said he that wouldn't go into this.

MR. HUNTER: No, I never said that, and they took his deposition for four hours.

He's also testified in a trial. There's no prejudice here and they can take his deposition forever.

He's going to say the same thing. He's just going to testify as to what was their public reaction to the Northwest's banning smoking.

THE COURT: Had I known this was an area that had not been gone into in deposition, I would have allowed the defense to depose him. However, I find there should be no prejudice to this entire area of questioning.

MR. UPSHAW: How can there be no prejudice? I have no idea what he's going to say. He asked him about TV, Judge. He asked him whether he had seen TV, so we're going to allow the witness to testify on hearsay from the television?

THE COURT: He can testify as to his personal knowledge as to the reaction of the tobacco companies.

MR. UPSHAW: Personally, not from TV.

THE COURT: However he got that knowledge. I mean I don't know -- I don't know if he read reports, read advertisements,

whatever it may be.

MR. HUNTER: I'm not offering it for the truth. In fact, I dispute the truth. It was false. I'm offering it to show that it, in fact, occurred. I'm not offering these out of court statements for the truth of the matters contained therein. This is to show that this happened.

THE COURT: I'll overrule it.

(Whereupon, the sidebar discussion was concluded.)

MR. HUNTER: Can you read back to Mr. Brown the question?

THE REPORTER: Sure.

(The indicated portion of the record was read back by the reporter as follows:

"Q. At about that time, did you have an opportunity to see CNN and read the newspapers and see television concerning the subject of Northwest Airlines banning smoking?

"A. Yes.")

THE WITNESS: Yes, I did.

Q. (BY MR. HUNTER) Could you tell the jury what the tobacco industry's response was to the

public media to your company's decision to ban smoking?

MR. UPSHAW: Objection.

THE COURT: Overruled.

THE WITNESS: It was their attempt to distract the passengers from --

THE COURT: No. I'll sustain it. You can't give your opinion of it. You can state what occurred without putting your own opinion in, your own spin to it.

Q. (BY MR. HUNTER) Tell us what you saw that they actually printed or said as opposed to what their motives were.

A. To teach companies like Northwest a lesson --

MR. UPSHAW: Objection, Your Honor. Same answer.

THE COURT: Sustained.

Q. (BY MR. HUNTER) Can you tell us the types of information they put out and the advertising that they took out concerning Northwest?

A. They said it was a smokescreen, that smoking didn't harm your health.

MR. REILLY: Objection, Your Honor.

This is not responsive to the question --

THE COURT: Overruled. This is responsive.

Q. (BY MR. HUNTER) Go ahead, sir.

A. Said that smoking didn't harm your health and there was nothing wrong. Smoking --

Q. And they accused your company of putting out a smoke --

MR. UPSHAW: Objection, Your Honor.

THE COURT: Sustained.

Q. (BY MR. HUNTER) You said a smokescreen. Explain that to us a little bit.

MR. REILLY: I object, Your Honor. This is asking for hearsay or it's asking for some sort of commentary rather than a recitation of whatever he may or may not have seen.

THE COURT: Overruled. It's not being offered for the truth.

Q. (BY MR. HUNTER) Go ahead, sir.

A. Northwest -- it was said that Northwest had a high complaint record and Northwest was trying to put the blame on smoking, on the tobacco industry, so the tobacco industry said that Northwest was offering a smokescreen.

Q. Is it true what they said about your

company?

A. No, it wasn't. We took pride in trying to make our airlines safe, for healthy reasons in spite of the hits that we took and criticism from the tobacco company.

Q. Now, Mr. Brown, did smoke bother you on the planes?

A. Yes, it did.

MR. REILLY: Objection, Your Honor.

THE COURT: Overruled.

Q. (BY MR. HUNTER) Well, why didn't you just quit your job?

MR. REILLY: Objection, Your Honor.

MR. UPSHAW: Objection, Your Honor.

Q. (BY MR. HUNTER) And walk away from your job?

MR. UPSHAW: Relevancy.

THE COURT: Sustained.

Q. (BY MR. HUNTER) Well, did you ever give any consideration to just giving up your job, your career?

MR. UPSHAW: Objection, Your Honor.

Q. (BY MR. HUNTER) Because they wanted to sell cigarettes?

MR. UPSHAW: Speculation.

THE COURT: Sustained as to relevance.

Q. (BY MR. HUNTER) Do you consider yourself to have personal responsibility, sir?

MR. UPSHAW: Objection, Your Honor. Relevancy.

THE COURT: Overruled.

THE WITNESS: As air crew members, pilot, flight attendants, we're dedicated. I think we possess the right stuff. It's something we dream about and wanted to help our passengers.

I related to that responsibility of a nurse or in the emergency. I call it the right stuff.

Everybody can't do that type of career, and I'm not flying now, and I don't like it very much. It hurts to lose your wings, so we're all dedicated. You know the recent --

Q. (BY MR. HUNTER) Don't go into --

A. -- airline industry.

Q. -- any specifics by that. There's been a ruling by the Court on that event.

A. Yes. It's the dedication that's in our hearts, it's in our lives.

Q. Did you ever consider in your heart of

hearts giving up your career so that the tobacco company could sell cigarettes?

MR. UPSHAW: Your Honor, objection.

MR. HUNTER: Judge --

THE COURT: Sustained.

MR. HUNTER: All right.

Thank you, sir. I have no further questions.

THE COURT: Thank you.

Cross-examination?

MR. UPSHAW: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. UPSHAW:

Q. Mr. Brown, good afternoon.

A. How are you, sir?

Q. How are you?

A. Fine.

Q. My name is Anthony Upshaw. I represent one of the defendants and I'll be asking you some questions today, okay?

A. Okay.

Q. Are you comfortable?

A. Yes.

Q. Have we met before, sir?

A. No, sir.
Q. You never flew with Ms. Janoff? That's Ms. Janoff right there, correct?
A. That's correct.
Q. You met her recently, haven't you?
A. Yes, sir.
Q. In fact, sir, when did you come -- where are you from?
A. I'm from Atlanta, Georgia.
Q. When did you get to Miami?
A. Thursday.
Q. You've been here since Thursday?
A. Yes, sir.
Q. During that time you've had an opportunity to meet with Ms. Janoff?
A. Yes, sir.
Q. You met with these gentlemen here (indicating)?
A. I met with Mr. Weinstein. I was introduced to Mr. Hunter.
Q. Okay.
A. I don't know that gentleman (indicating).
Q. This is Stuart Williams.
MR. WILLIAMS: How are you?

Q. (BY MR. UPSHAW) He works with Mr. Hunter. But you met with Mr. Weinstein and you had spent some time with Mr. Hunter, yet, or were you just introduced to him?

A. I was introduced to him on Thursday.

Q. Okay. Now you never flew with Ms. Janoff?

A. That's correct.

Q. So you two never worked on the -- do you know what airline she worked for?

A. American.

Q. Okay. You never worked for American, did you?

A. No.

Q. Do you know what routes she flew?

A. No.

Q. Do you know how many hours per month she flew?

A. No.

Q. You said you were in the Air Force. You weren't a pilot in the Air Force, were you?

A. That's correct.

Q. You were a mechanic? You weren't an Air Force pilot?

A. Air Force pilot, no.

Q. You had a pilot's license at the time?
A. Yes, sir.
Q. But you weren't a pilot for the Air Force?
A. That's correct.
Q. You didn't become a pilot for our Armed Forces until you went to the Army, correct?
A. Correct.
Q. After you got out of the Army, you then went to become a police officer and after that, you flew commercial airlines?
A. Yes.
Q. Ended up with Northwest Airlines?
A. Yes.
Q. Throughout your time, am I correct, Mr. Brown, in stating that you were never the captain of any of the aircraft you flew commercially?
A. That's correct.
Q. You were either the flight engineer, you said --
A. Yes.
Q. -- or the first officer?
A. Yes.
Q. And what type of aircraft were you first

officer on?

A. McDonnell Douglas DC9.

Q. Which you told us is similar to the Super 80?

A. Yes.

Q. You were the flight engineer on the 727?

A. Yes.

Q. In fact, most of your testimony about you having to use a flashlight and things of that nature were when you were a flight engineer on the 727, correct?

A. No, I used a flashlight in all my career.

Q. In your whole year?

A. Yes.

Q. Even on the Short 360, you used a flashlight?

A. No.

Q. The 360 Short is what you flew for the public, right?

A. No, those were commuter flights.

Q. Oh, okay.

A. Well, it was part of the equipment, yes.

Q. Well, you said you used a flashlight during your career, so I thought you were just lumping it together. That's not right?

A. I would say I used my flashlight.
Q. You used your flashlight during the day?
A. No, sir.
Q. Okay. So this was just at night. I want to make sure this jury understands when you used your flashlight it was at night during night flights?
A. Well, that's not so. During the pre-flight inspection, there are some places where you have to see during the day as well.
Q. Mr. Brown, did you discuss at all during your direct testimony your pre-flight inspection?
A. Pardon me?
Q. Did you discuss at all with Mr. Hunter your pre-flight inspection?
A. I believe I did.
Q. Did you talk about --
A. When testifying.
Q. Did you talk about using your flashlight in where the cabin was with Mr. Hunter, right; you discussed that with him?
A. As far as testimony?
Q. Right.
A. Yes, sir.
Q. Okay. So that's what we want to talk

about now, all right?

A. Yes, sir.

Q. I know you probably had to use a flashlight when you're looking up in the nooks and crannies, didn't you?

A. Yes, sir.

Q. I want to talk about what happened in the passenger cabin, okay?

A. Yes, sir.

Q. Now you said you saw smoke. Did I hear that right?

A. Yes, sir.

Q. Now when you observed these conditions in the cabin, what did you do? What did you do when you returned back to the cockpit? Did you tell the captain the situation with the passengers?

A. Not necessarily, no.

Q. Did you tell the captain: They need more ventilation back there?

A. No, sir.

Q. Did you tell the captain: Turn off the no smoking sign, or turn on actually the no smoking sign for a little while, maybe it will clear up? Did you tell him that?

A. No, sir.
Q. The captain could have done both of those, couldn't he?
A. Yes, sir.
Q. He could have turned on the no smoking sign, sir?
A. Yes, sir.
Q. Could have increased the ventilation?
A. No, sir.
Q. Could not?
A. No, sir.
Q. Let's talk about that particular aircraft. The 727 that you flew on where you were flight engineer, you couldn't increase the airflow in the cabin?
A. No, sir.
Q. Okay. Do you remember you took a deposition, sir?
A. Yes, sir.
Q. That deposition was January 21st, I believe, of this year up in Atlanta, right?
A. Yes, sir.
MR. UPSHAW: Page 99, Counsel.
Q. (BY MR. UPSHAW) Line 10, Mr. Brown, do you remember this series of questions and

answers: So on each of those planes, the pilot on the flight deck was who controlled the ventilation?

And your answer was: Yes.

The next question was: You could increase the ventilation if you chose?

The answer was: Yes.

Do you recall that series of questions and answers from your deposition?

A. Yes, sir, I do.

Q. So are you telling us today that the captain could not increase the airflow in the cabin?

A. Yes, sir.

Q. So you were wrong then?

A. Yes, sir.

Q. Now if it would recirculate air, tell these fine ladies and gentlemen whether there was recirculated air on the 727s that you flew on?

A. To my knowledge, the air recirculated.

Q. At what percentage, if you know?

A. I don't know.

Q. As the flight engineer, could you turn it off or could you suggest it to the captain: Turn off the recirculating fan?

A. No, sir.
Q. You couldn't do that?
A. No, sir.
Q. That wasn't under your power?
A. If I turned off that switch, I would kill pets and precious cargo beneath the aircraft.
Q. So you couldn't turn off the recirculating fan?
A. No, sir.
Q. You had to leave that on so that the cargo under in the cargo hole would get air?
A. Yes.
Q. You could have increased or added an air condition pack, what they called packs, right?
A. No, sir.
Q. You couldn't add one of those either?
A. No, sir.
Q. Are you telling me that you ran full time with all packs available?
A. As prescribed by the FAA, sir, yes.
Q. And also prescribed by your airline; is that right?
A. Yes.
Q. So your airline, Northwest, would tell you how to maintain that cabin environment,

wouldn't they?

A. If you will, procedures have to be approved by the FAA.

Q. That's not my question, sir.

A. Okay.

Q. My question was: Northwest Airlines who you flew with would give you policies and procedures -- I don't care where they came from before that -- and Northwest Airlines would tell you what you could do and you could not do to maintain that cabin environment?

A. Yes, sir, that's correct.

Q. And, in fact, once you were airborne, once that plane left the deck, the captain was in charge, right?

A. Yes, sir.

Q. So whatever went on on that plane, the captain would be responsible for, right?

A. I can't say yes to that. The captain has the authority.

Q. Okay.

A. But if an emergency took place, that wouldn't be the captain's responsible.

Q. I understand that. I understand that.

But the buck stops with the captain?

A. Yes.

Q. He made the decisions, right, on that aircraft?

A. Well, with the intervention of crew resource management and accidents, it remained the responsibility of the whole crew.

Q. Okay.

A. You didn't --

Q. Okay. I'm sorry, go ahead, tell me.

A. If we didn't conform to that, we could all be liable.

Q. I understand.

A. Yes.

Q. Let's go back to the ventilation. You would go out and see it was smoky, and you said sometimes you went out because there was complaints?

A. Yes.

Q. Did I hear that right?

A. Yes, sir.

Q. So you'd get a complaint and you'd go out into the passenger cabin, right?

A. Yes, sir.

Q. Right, with your flashlight?

A. Yes, sir.

Q. And you would see that it was smoky. The person who could change that environment while the plane was in the air was the captain, correct?

A. No, sir.

Q. He couldn't do it?

A. No, sir.

Q. He didn't have authority to change the ventilation?

A. No, sir.

Q. He didn't have authority to turn off the no smoking sign is what you're telling us?

A. He could --

Q. Turn it on?

A. He could turn on the no smoking sign but not change the environment.

Q. With Northwest Airlines?

A. Yes, sir.

Q. How about American?

A. I don't know about American.

Q. How about Delta?

A. I don't remember --

Q. How about United?

A. I don't know --

MR. HUNTER: Judge, he's not letting him finish his answers.

THE COURT: Sustained.

Q. (BY MR. UPSHAW) You said, sir -- and I take it this wasn't all the time, that at times you would go back to the cockpit and you use your oxygen; is that what your testimony was earlier?

A. Yes, sir.

Q. Did you provide oxygen to the passengers too?

A. Not supplemental oxygen, no, sir.

Q. So they had to stay where they were, but you could go up and get oxygen?

A. Yes, sir.

Q. Was that, as you said, providing for the comfort and safety of the passengers that you took pride in?

A. I guess you can say that, sir.

Q. Fuel economy was important to Northwest Airlines, was it not?

A. Yes, sir.

Q. The number of air condition packs you ran at any particular time would have an affect on how much fuel you used on a particular flight, wouldn't it?

A. I really don't know. I'd have to think about that a little bit more.

Q. Okay. If you don't know, that's all right.

MR. UPSHAW: Your Honor, give me one minute. I may be done.

THE COURT: Okay.

MR. UPSHAW: Let me just see if my co-counsel have any questions.

No.

Thank you, Mr. Brown.

THE WITNESS: Thank you.

THE COURT: Mr. Hunter, you may redirect.

MR. HUNTER: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. HUNTER:

Q. Mr. Brown, did you have an opportunity, although not in charge of the plane, but did you have an opportunity during your career to fly on other people's airlines and see what the condition of the smoke was in other company's air cabins?

A. Yes.

Q. Was it similar to Northwest?

A. Yes.

Q. Counsel had interrogated you about air

packs or something. Are they controlled by the FAA as to how those are operated?

A. Yes, they are.

Q. All right. And you and I, when did we first ever discuss this case?

A. Today.

Q. What time?

A. About 12:30.

Q. All right. We talked over lunch?

A. No, we didn't have lunch.

Q. We talked while everybody else was eating.

All right. Have I ever discussed the case with you before then?

A. No, sir.

Q. Now you were asked some questions about your deposition and the answers you had given in your deposition?

A. Yes.

Q. Is there an explanation that you have as to why your answers were different at that time?

A. Yes. I went back and studied my aircraft manuals, and I could see that a lot of things were getting turned around.

Q. Yes, sir.

A. And it just wasn't true, so I had to bring that out, and I stand that we -- the pilots had no control over the ventilation. It was a sealed environment. Not even the outside air went into the airplane.

MR. UPSHAW: Objection. Nonresponsive.

THE COURT: Overruled.

THE WITNESS: What was in that environment, the oxygen at a set level, when smoking or tobacco was introduced, it reduced that amount of oxygen, therefore, causing undesirable conditions.

Q. (BY MR. HUNTER) And the attorneys representing tobacco had an opportunity to take your deposition in February?

A. Yes.

Q. Could you --

A. January.

Q. All right. In January.

And could you tell the jury the difference in the air quality after they banned smoking as opposed to what it was like before?

A. It had definitely improved.

Q. Okay. Thank you. I have no further questions.

A. Thank you.

THE COURT: Thank you, sir. You are excused.

THE WITNESS: Thank you.

(The witness was excused.)

MR. HUNTER: Your Honor, at this time we would offer the video deposition of Dr. David Burns.

THE COURT: All right. You may set it up.

MR. HUNTER: Your Honor, may I inquire or have the Court inquire of the jury as to whether the screen is close enough.

THE COURT: Can everyone see it?

MR. HUNTER: Would anyone like it closer?

THE COURT: Does anyone want it to be closer?

THE JURY PANEL: It's fine.

THE COURT: No, it seems to be fine.

THE VIDEOGRAPHER: Just a minute.

I believe I'm ready now, Your Honor.

(Whereupon the videotaped deposition of Dr. David Burns was played to the jury as follows:)

DIRECT EXAMINATION

Q. Dr. Burns, please state your full name and your present professional address.

A. Okay. I am David Michael Burns, and I am professor of medicine at the University of California, San Diego School of Medicine, 200 West Arbor Drive, San Diego, California, 92103.

Q. We've had some Ph.Ds testify in this case and I just want to establish that you are an M.D.?

A. Yes, I am.

Q. Okay. Let me take you through initially your education, your medical education as well.

You went to Boston College, and you got a Bachelor of Science in biology?

A. That's correct.

Q. In what year?

A. I graduated from Boston College in 1968.

Q. And then you attended Dartmouth Medical School?

A. That's correct.

Q. For how long?

A. For two years and I received a Bachelor of Medical Science for the first two years of

medical school at Dartmouth.

Q. And after having completed that curriculum at Dartmouth -- by the way, Dartmouth is located in New Hampshire?

A. Yes, sir, that it is.

Q. In terms of your formal additional medical education, where did you go from Dartmouth?

A. I received my doctorate in medicine from Harvard and then I trained in internal medicine at Boston City Hospital on the Harvard medical service at Boston City Hospital.

Q. So you got your M.D. degree at Harvard?

A. Yes, I did.

Q. Now the internship, we're now in the early '70s when you were serving your internship?

A. That's correct. I was an intern and resident from 1972 through 1974.

Q. And where did you serve your residency?

A. At -- I was a resident at Boston City Hospital.

Q. You were a resident in what particular specialty?

A. In internal medicine.

Q. What -- broadly define what is internal medicine.

A. Well, there are sort of three categories of basic types of services. The first is surgical. The second is those nonsurgical treatments of disease processes, which is internal medicine, and then there are diagnostic services, such as radiology or pathology or some of the other specialty diagnostic services.

So internal medicine is really that body of medical practice that specializes in the nonsurgical management of illness, illness like high blood pressure, heart disease, lung disease, kidney disease, et cetera.

Q. So in terms of a specialty, unlike -- like a neurosurgeon who would be dealing with a more limited area, internal medicine is obviously broader?

A. Internal medicine is a very broad specialty, that's correct.

Q. Now what I'm going to do -- I'll go down your curriculum vitae and ask you about certain specific things that are listed there and then have you explain.

You were a medical officer in the National Clearinghouse for Smoking and Health, Bureau of Health Education, Centers for Disease

Control in Atlanta for two years?

A. That's correct.

Q. So tell us about that, what you were doing, what your function was.

A. When I completed my training in internal medicine, I went into the Public Health Service for two years. During the time I was in the Public Health Service, I was at the National Clearinghouse for Smoking and Health, which was the organization in the Public Health Service responsible for tobacco issues.

I was the medical staff officer for that group, and I wrote the 1975 Surgeon General's report as part of my responsibilities at that time.

I was also responsible for a variety of other tobacco issues from 1974 through 1976 including the management of one of the national surveys of smoking behavior.

Q. Now you were -- you were a pulmonary fellow at the University of California Medical Center from 1976 through 1979?

A. That's correct.

Q. Now let me -- the jury has heard about a residency program, which obviously is what you

need to go through before you can specialize in the field of internal medicine?

A. That's correct.

Q. Now what is the difference between a fellowship and a residency?

A. Well, at the completion of your residency, you are broadly trained to deal with most of the problems that occur in internal medicine.

There are obviously in each individual organ system special kinds of problems, difficult problems, more complex issues, and so we have evolved specialists that deal with just those issues.

Cardiologists, for example, deal with heart attacks and managing hypertension and managing congestive heart failure. In my own case, I took a specialty in pulmonary medicine, which is lung disease, and intensive care medicine.

So that is a specialty in diseases of the lung, chronic obstructive lung disease, asthma, and a variety of other complications that occur in the lung, as well as the management of the patients in intensive care units which is a

very complex area and it requires one individual to organize information from multiple different systems.

You're -- in an intensive care unit, you may have bad lungs and a bad heart and bad kidneys and so we need to have one person manage how the treatment of all three of those disease processes is coordinated and so that becomes a fairly specialized area of practice as well.

Q. In terms of -- in terms of the hospital population, those people who are in the intensive care units, they are the sickest, the most critical people?

A. That's correct. They are the people who are in shock. They are the people who are on mechanical ventilation. Those are people who have very severe infections.

Q. To this day, are you involved in intensive care, critical care medicine?

A. Yes, I am. I completed a month in May, as a matter of fact, in the intensive care unit.

Q. Are you board certified, Doctor, in any specialty?

A. Yes, I'm board certified in internal medicine. I'm also board certified in pulmonary

medicine, and I have a certificate of special accomplishment in critical care medicine.

Q. It's already been explained to the jury what it means to become board certified, so I won't take you through that.

A. Okay.

Q. Now you are the acting medical director of the Pulmonary Function Laboratory at the University of California, San Diego Medical Center. What is that and how does it differ from your intensive care duties?

A. Actually I was the acting director for a period of time. I am -- I transferred those responsibilities a number of years ago.

The Pulmonary Function Laboratory is that laboratory that measures how well your lungs breathe and makes measurements of blood, concentrations of oxygen and carbon dioxide particularly from the arterial blood.

So we measure how well your lungs are functioning, how big a breath you can take, how fast you can blow the air out, and we also measure whether that oxygen that you inhale actually gets into the arterial blood and transfer it around in the body.

So I was responsible for making sure that that test was done correctly for interpreting those tests and for training the fellows in that laboratory.

Q. Now temporarily, I'm going to move to the area of your involvement with Surgeon General's reports --

A. Okay.

Q. -- over the years.

Now your very first involvement with any United States Surgeon General's report was in what year?

A. In -- my first involvement was in 1974 when I joined the Public Health Service, and I was assigned the task of writing the annual report to the Surgeon General -- or of the Surgeon General at that time.

And there I began the process of examining all the information and writing the draft chapters. So it began in 1974, and it came out, was published in 1975.

Q. Were you, in fact, -- what was your title with respect to the 1975 Surgeon General's report, if you had any?

A. Well, as most of you know in government,

I had a very grand title. I was the Medical Staff Director of National Clearinghouse for Smoking and Health for that report.

It was kind of a shame I didn't have a medical staff, but I was the Medical Staff Director. So -- but, indeed, I was the physician responsible for actually drafting that report and for making sure that its scientific content was correct.

Q. And what has been your involvement with the various Surgeon General's reports over the years since 1975?

A. I have been an author, editor, or reviewer of every single Surgeon General's report that has been published since 1975, and they are published usually on an annual basis.

Q. Let me -- let me ask you to distinguish between the responsibilities of an author, editor, and reviewer of a particular Surgeon General's report.

A. All right. Well, in the first experience that I had with Surgeon General's reports, they were produced by the general public in-house, that is someone who was a public health officer would actually draft the first chapter.

That's what I did in 1974 and 1975. Those chapters would then go out to outside experts, people who were then scientists throughout the country, and we would ask them to respond and review that information to tell us whether it was complete, whether it was accurate, whether the conclusions that were drawn were correct. It would then come back, be changed, rewritten, and sent back out again as a whole document to another larger group of reviewers and to the entire US Public Health Service as agencies of the US Government.

After 1978, that process changed, and what we did was ask experts throughout the country to write either draft sections or on occasion an entire draft chapter.

Once those experts completed that chapter, they sent it to us, and we never sent it back again. And there were a group of editors who were responsible for examining that to make sure that it was accurate, complete, and expressed clearly what was being said scientifically.

That chapter was then sent out to a group of expert reviewers different than the authors, all across the country. Their comments

were received by the editors, and the editors made the changes in the document at that time, not the individual authors.

We wanted to be sure that the biases that creep in when you write something yourself were not influencing the content or the conclusions of the report.

Having completed each chapter, we then put all of the chapters together as a document and sent it to a group of senior individuals who had a very broad experience with the tobacco issue to look at accuracy, balance, tone, and consistency of the document as well as whether the conclusions drawn were supported by the data contained in the document.

At the same time, it was sent to each of the agencies of the Public Health Service for formal review of its content for accuracy and completeness. Those comments were, again, sent back to the editors. The editors again changed the document in response to those comments.

And then it was sent officially through the Public Health Service, to the Surgeon General, to the Assistant Secretary for Health, to the Secretary of Health and Human Services or

Department of Health Education and Welfare in the old days, and then it is sent to Congress as part of a requirement by law that these documents be submitted to Congress.

At that point, it becomes not only the consensus of the scientific community, but also the official position of U.S. Public Health Service on the tobacco issues.

Q. Now you were actually the senior scientific editor of the Surgeon General's reports from 1984 through 1987?

A. That's correct.

Q. So with respect to the 1986 Surgeon General's report, which is in evidence, the title of which is The Health Consequences of Involuntary Smoking, you were the senior scientific editor of this?

A. Yes, I was.

Q. And, of course, obviously in terms of the acknowledgements, it mentions that. Now then it goes on to mention --

VOICE: Page, please.

VOICE: Roman Numeral VIII at the very beginning.

Q. The heading is Acknowledgements.

Now in the same paragraph where it recites that you're the senior scientific editor, David M. Burns, it mentioned several consulting scientific editors, and then it goes on -- there's a rather lengthy list of doctors who prepared draft chapters or portions of the report.

And this is the process you were referring to earlier?

A. That is the process I was referring to earlier, and then if you go on further, you'll see that there's also a separate list of those individuals from across the country that reviewed the content of either chapters or the entire document.

Q. So in that sense, is this a peer-reviewed document?

A. It is a very extensive peer-reviewed process and it has three separate stages to it. The first two are with academic and scientific groups and the last is clearance through the U.S. Public Health Service. So it is far more extensively critiqued than is a normal publication in a journal.

Q. Now obviously, Dr. Burns, the 1986 Surgeon General's report, did it deal exclusively

with the issue of involuntary smoking, secondhand smoke?

A. Yes. After the 1979 report, which dealt with the broad range of issues, we produced a report each year which focused on a specific aspect of the damage caused by tobacco. In this year, we focused on environmental tobacco smoke exposure, involuntary smoking, secondhand smoke, the exposure of nonsmokers to tobacco smoke in the air.

Q. I'm limiting this question now to the Surgeon General's reports as an overall entity, and I want to find out from you: When was the very first time in a Surgeon General's report that the subject of involuntary smoking, secondhand smoke was dealt with?

A. 1972. And actually antecedent or came before my tour of duty in the Public Health Service.

Q. And who was Surgeon General of the United States in 1972?

A. I believe it was Dr. Steinfeld, Dr. Jesse Steinfeld.

Q. What was the background, if you know, of the subject of involuntary smoking being dealt

with as early as 1972?

VOICE: Objection. Hearsay.

THE COURT: Overruled.

THE WITNESS: Well, clearly we were interested in the health consequences of smoking. Having established the magnitude, the rather enormous magnitude of the disease risk produced by exposure to tobacco smoke, a number of people, most significantly Dr. Steinfeld in his responsibility as Surgeon General, began to ask the question that if you have such a tremendous amount of disease from this high-dose exposure, will a lower dose exposure also cause disease? Will you get less disease but still more than should be accepted for purposes of public health?

And he asked that question and raised the issue by most of the methods that we would use to deal with an occupational exposure, asbestos or some of the other kinds of exposures.

The data on active smoking would lead to the conclusion that people shouldn't be exposed to secondhand smoke either.

He surfaced that issue, and it became

an issue of great conflict between his office and the tobacco industry and, therefore, he --

VOICE: Your Honor -- excuse me, Doctor. Just a minute.

Your Honor, this is all classic hearsay testimony. I object to it.

THE COURT: I'm going to overrule the objection on that.

THE WITNESS: And that resulted in his asking for the Office on Smoking and Health to specifically address the science on this issue, and that was the antecedent to the -- or the reason why in 1975, when I was authoring that report, we also took a second look at the data because a lot of new information had accumulated scientifically.

So that's my understanding of the reason why that first chapter was written.

Q. Now you've mentioned that secondhand smoke was dealt with in the 1972 Surgeon General's report, again in the 1975 Surgeon General's report, which you basically wrote?

A. That's correct.

Q. Okay. Now between 1975 and 1986, was

the subject of secondhand smoke dealt with again in a Surgeon General's report?

A. Yes, it was also dealt with in 1979, and they were -- it was also dealt with again in the report on cancer in 1982, as well as I believe there was a section in the 1984 report as well, the one on lung disease.

Q. With respect to the 1979 Surgeon General's report, and the jury has heard from Dr. Milton Richmond, who was Surgeon General at that time, what was your specific role with respect to the '79 Surgeon General's report?

A. I was one of the editors of the 1979 Surgeon General's report. I also authored the chapter on involuntary smoking and the chapter on pipe and cigar smoking.

Q. Now what was the tobacco industry's public reaction to the material contained in the 1979 Surgeon General's report?

A. I was in Washington prior to the release of that report in order to be able to help explain to the press its scientific content. The tobacco industry released a press -- had a press conference and released a document the day before criticizing the report, suggesting that the report

was the result of the biases of Secretary Califano who was Secretary of Health and Human Services at that time, and saying that the --

THE COURT: I don't want to get into the detail of that. It was critical --

THE WITNESS: -- that the scientific content was not valid.

Q. And did the tobacco institute call its press conference about the 1979 Surgeon General's report prior to the release of the report?

A. Yes, it did.

Q. In that press release, were they critical of the methodologies, and did they attempt to point out flaws in the reasoning underlying the conclusions of the '79 Surgeon General's report?

Now was that the -- was that the first time from the standpoint of any Surgeon General's report that that issue was specifically dealt with, the causal relationship between smoking and disease?

A. That's what we have traditionally considered the first in the series of what we call Surgeon General's reports.

Q. Dr. Burns, you are a fellow of the

American College of Chest Physicians?

A. I am.

Q. What is that organization?

A. The American College of Chest Physicians is the group of physicians who specialize in lung disease and heart disease, and it is a professional society. They have meetings, scientific meetings to keep us up to date on various aspects of the science and treatment of heart and lung disease.

Q. And you are also a member of the American Thoracic Society and the Society of Critical Care Medicine. You've already explained critical care.

The American Thoracic Society is what?

A. Right. The American Thoracic Society is the physician professional scientific arm, if you will, of the American Lung Association. They are dedicated to the science of lung disease, and they have national meetings and produce a series of materials, educational and otherwise, to help train and keep people current in aspects of science that relate to lung disease.

Q. Let me -- let me ask you about a couple of awards that you've received.

The Surgeon General's Medallion in 1989, what is the basis to awarding that to a particular physician?

A. That was an award by Dr. C. Edward Koop for the work I had done in tobacco control and particularly for the work I had done in editing the Surgeon General's reports.

Q. You received the American Lung Association Life and Breath Award for distinguished community service. What was that in recognition of?

A. San Diego was one of the early communities that began to pass regulations that protected nonsmokers from exposure to environmental tobacco smoke, and because of my expertise in this area, the Lung Association had turned to me for help, and I had worked with them in making presentations to city councils and the board of supervisors for the county and working on several task groups for the board of supervisors to work out how these regulations would be put in place and to actually get them implemented, and I received that award for that work.

Q. I'm going to ask you just a couple of questions about a couple of publications.

The Health Consequences of Involuntary Smoking, which you -- you refer to the proceedings of the Third World Conference on Smoking and Health held in 1979 -- 1975.

What does that Third World Conference refer to?

A. There have been a series of World Congresses on tobacco issues. They're drawing people from all around the world, developing nations, developed nations, people from the U.S., Canada, Europe, Asia, Africa, all different countries.

And they come together to exchange information about the disease risks associated with tobacco, about the methods by which you can help people to quit, about methods to help prevent kids from starting and a variety of other issues that relate to tobacco.

This was the third of those meetings, and it was held in New York, and I presented a paper that was part of that proceeding.

Q. Now the Health Consequences of Smoking for Women, it's not clear to me, was that actually a part of the Surgeon General's report, or was it a separate publication?

A. The 1979 Surgeon General's report, which you can see sitting on the table, is a document about 2,500 pages long, covered the entire waterfront of science, of what we knew.

It was felt that the understanding of the scientific community and the public health would benefit from focused examinations of very specific issues. One of the issues that was principally of concern at that time was whether women were somehow protected from the disease consequences of smoking.

They had lower rates of lung cancer. They had lower rates of heart disease. Did that mean that they were protected somehow from the affects of smoking? And so, therefore, we spent an entire year preparing a document that looked at all of the science that was available that examined the risks specifically for women.

Q. Is there at the present time any controversy in the medical and scientific communities across the United States on the scientific question as to whether secondhand smoke causes disease?

A. No, there is no longer any scientific controversy in the scientific community as to

whether exposure to secondhand smoke causes disease.

The science has been examined over and over again, and there is no longer any doubt.

Q. How long has that been the situation where essentially there has been no controversy on that issue in the medical and scientific communities?

A. I think that the U.S. Surgeon General's report in 1986 and the report of the National Academy of Sciences in 1986 represent the end of the scientific debate about whether cigarette smoke as environmental tobacco smoke could cause disease in nonsmokers.

Q. For the purpose of this question, let me move away for a moment from the subject of secondhand smoke specifically and ask you generally how the EPA or any other governmental agency goes about banning an environmental agent which they consider to be dangerous to the public's health, and give a couple of examples of some of these agents.

A. Sure. There are several ways that they go about it, but the principal way is that they become concerned about an agent and then they

assemble all of the science that they can, all of the information available in the scientific literature on that subject.

And they look at it, and then they put out a draft that says: This is what we think is going on. This is what we think the science says. And various groups come in and offer new information, offer critiques of their position, and the regulatory agency tries to be very neutral in examining the science to be sure that it's being fair and direct.

Normally what happens, for example, with asbestos exposure, something that the -- there has been great regulatory control and change over, over the last 20 or 30 years, is that you look at the agent and you say: Is this hazardous?

And you look at people who have high-dose exposure, people who work as insulators where they spray asbestos on buildings and, therefore, inhale it in high concentrations for very long periods of time.

That then establishes whether the agent causes disease. Then the question is: How far down do you have to reduce that exposure before you can be comfortable that either it doesn't

cause disease or that the disease would be very rare?

So you look at populations then with lower doses of exposure until you find groups that have very small exposures to asbestos, but you can indeed demonstrate an increased risk, and you then look at how much exposure that was.

And then because often the measurement requires a fair amount of disease, and the way we measure this particularly in people is by seeing how many people get sick. So if you have an increased number of people getting sick who have an exposure, it usually means that there's a substantial, in a human sense, amount of disease occurring in people that you don't want to have happen.

And so what you do is draw a line from that high-dose exposure to the lower dose exposure until you get down, and extend it down, until you're down where you are comfortable that the level of disease that might be produced is small enough that it isn't substantive in a human sense.

It doesn't cause enough people to get sick that you and I would think that it was a

meaningful risk, and that's what they set the level at.

With asbestos, they first set a level at five, and there are no studies that show at five fibers per CC, which was the standard, that there is an increased risk of developing disease from asbestos.

But when you extend it downward and you consider the limited number of people that have that exposure, you would be concerned that a lot of folks might get sick.

And so they changed it in the late '70s, early '80s down to two. Ultimately in the mid '80s, down to .5 and now they have banned asbestos because of its toxicity. The same thing is true of, for example, ozone. But in ozone, things are a little bit different in that what they do is they do both human studies and animal studies. They expose animals to ozone to see what happens to the lung.

You get a significant irritation response when the level of ozone is high. You begin to cough. You begin to have extra secretions in your chest with high levels of ozone exposure.

You test that in animals to see what happens, and then you look at populations in cities like Denver and Los Angeles that have high concentrations of ozone and you compare them to other populations with lower concentrations.

And you look to see whether there's a significant amount of illness, respiratory infections, getting the flu or getting an upper respiratory infection that occurs in those populations.

And you also look at people who come in for a period of time and first get exposed to that high level and see whether changes occur in those populations.

The same thing has been done with dust in the air, little tiny particles. They actually are most concerned about the particles that are small enough for you to be able to inhale them into your lung and have them stick in your lung. Those are called respirable or inhalable particles, and we have known for some time that there was a concern because in very high levels of exposure in -- for instance, in London when they had air emergencies with all the coal-burning fires that people had in London, a number of

people who were sick with heart and lung disease died each time that air pollution level went up from these respirable particulates.

Since then we've examined larger populations, and we've become concerned and have developed evidence to show that lower levels of those particles may cause problems for a lot of us, and so they have extrapolated downward and are trying to set the level of inhalable particles below the level at which it would cause disease in the general population.

So that's the process by which any governmental agency that's responsible for regulating an agent goes about examining this process.

Q. Dr. Burns, I think where we left off was I asked you about the fact -- you discussed the process with respect to ozone, with respect to asbestos, and then I asked you: Was that process followed with respect to secondhand smoke? What was your answer to that question?

A. My answer was, no, it was.

Q. And my next question is: Why not, to your knowledge?

A. Well, there were two principal reasons

why not. The first was that the tobacco industry had been successful at casting the question such that: What is secondhand smoke? It's something different. It's not tobacco smoke.

We have no understanding of this brand new agent. It's not the same tobacco smoke that people inhale. It's completely different, and until we have completely examined it, it's a brand new exposure.

And the second reason was that the Office on Smoking and Health at that time was under intense pressure to be very conservative in what it was doing.

It was very reluctant because of that pressure to extrapolate or extend beyond the data they had to do the kind of downward extension from known data projecting out to what should happen.

That is normally done for any other occupational exposure, and so the office itself was very reluctant to do that type of downward extrapolation without data. Whenever we put out a Surgeon General's report, we would tend to look at what the data could show and then would take one step back in order to be conservative because we knew that anything we said would be intensely

criticized by the tobacco companies both to us directly and also in the general media by placement of ads and stories in newspapers and reports to reporters.

Q. So when you talk about -- that the Office on Smoking and Health was under intense pressure, intense pressure from who?

A. From the tobacco industry and their representatives, people that would talk to the media, advertisements that were placed in newspapers, that kind of pressure.

Q. What kind of advertisements were placed in the newspapers as it related to the issue specifically of secondhand smoke?

A. They would publish ads that were very critical of the science, that were very critical of the issue, and that would in general define these issues as not significant, important, or scientifically valid ones.

Q. And do you have an opinion based upon reasonable medical probability as to whether flight attendants' exposure to secondhand tobacco smoke in airline cabins causes respiratory and pulmonary diseases and disorders including chronic bronchitis, sinus disease, aggravation of

asthmatic conditions and allergies, as well as respiratory ailments and lung disease?

A. Yes. Those diseases are largely diseases that respond to the irritant character of the smoke, the irritation and the abrasive nature of the chemicals in the smoke itself.

And so regular exposure to that irritant over the course of about a year would be enough to cause problems with your sinuses, would cause changes in the small airways of your lung and could produce a chronic cough.

Q. Dr. Burns, do you have an opinion based upon reasonable medical probability as to whether exposure to secondhand smoke by flight attendants causes the same diseases and disorders caused from direct smoking?

A. Yes.

Q. In the course of your adult life, have you had occasion to fly a lot?

A. Yes, unfortunately, I've had occasion to fly more than I would actually care to.

Q. As a matter of fact, you flew in from San Diego and tonight you're flying back to San Diego?

A. Tonight I'm flying back to San Diego,

that's correct.

Q. Which is not unusual?

A. Not unusual.

Q. And before the ban went into effect, the smoking ban went into effect in 1990, did you have occasion to personally observe the impact, the effect of secondhand tobacco smoke in airline cabins?

A. Absolutely, both in the nonsmoking section where almost always I was able to get a seat.

Occasionally in the smoking section where I would be able to get the last seat on the plane and had to make a choice about whether or not I would get to my destination or take a smoking seat, and so I've had experience with both nonsmoking sections and smoking sections.

Q. And in general, what were your observations about secondhand smoke in airline cabins?

A. My observation was that even in the nonsmoking section, if there were significant numbers of people smoking, you could smell the smoke and you could also quite clearly smell it on your clothes when you'd get off the plane, that is

when you took your clothes out of your hanging bag or your jacket that you put in the overhead, you could very clearly, when you put it on, smell the smoke there.

The intensity of the exposure was one that was tolerable, but annoying. However, when I was sitting in the smoking section, you could see the smoke in the air. You could taste it. It made my eyes burn.

It was a very penetrating and annoying level of smoke. It caused irritation when I inhaled it, and it was what I would characterize as a quite intense exposure and one that I would not voluntarily subject myself to if I had any other choice.

It's one that -- if I had been sitting in a restaurant, it's a level of exposures that would have left me to leave -- would have led me to leave. That's a little hard to do on an airplane.

Q. Dr. Burns, other than the Surgeon General, the EPA, the Public Health Service, what other official agencies either of government in the United States or worldwide, have taken an official position with respect to secondhand smoke

causing disease in healthy nonsmokers?

A. Well, I am quite familiar with the fact that the American Medical Association, American Thoracic Society, American College of Chest Physicians, the World Health Organization, American Lung Association, American Cancer Society, American Heart Association, the Canadian government, the British government, the British Public Health Service, World College of Physicians, have all taken positions on secondhand smoke that are the same as the one that I have just taken.

Q. So who is on the other side of this issue?

A. The only group on the other side at this point in time are the tobacco industry and their representatives. There simply is no controversy scientifically.

Q. Dr. Burns, before I contacted you and asked you whether you would be willing to serve as a witness in this case, had we known each other?

A. No.

Q. Had we had any connection whatsoever?

A. No.

Q. Are you charging for your services, for

your time in testifying in this case either for having given an all-day deposition or for your testimony today?

A. I did bill the tobacco industry for the deposition. I am not billing for my time today or for the time I've spent preparing for this case.

Q. Thank you, Dr. Burns.

THE COURT: Cross?

VOICE: Thank you, Your Honor.

CROSS-EXAMINATION

Q. Good morning, Doctor.

A. Good morning.

Q. I'm David Hardy and we met before, haven't we?

A. Yes, we did. I believe we met in a case in Indiana.

Q. Prior litigation?

A. That's correct.

Q. Rogers in Indiana last summer, do you remember?

A. I do indeed.

Q. You had asked about whether it caused any serious disease, didn't you?

A. No, I actually -- in that document, I

described a number of significant problems that both, particularly children but also adults had. I would consider those significant problems.

Q. Do you remember, Doctor, making a speech in 1975 which was later reprinted in the Journal of Breathing, a speech that you made at the workshop on rights of nonsmokers conducted by the National Inter-Agency Council on Smoking and Health in New York held at the University of Maryland?

A. I remember that I did make a speech and that it was published. The details obviously are not ones that I have in my memory at the moment.

THE CLERK: Defendants' Exhibit H marked for ID.

Q. Doctor, I show you -- may I approach, Your Honor?

THE COURT: Yes, sir.

Q. I show you what the reporter has marked as Defendants' Exhibit H, and ask you if you recognize that as a copy or reprint of your 1975 speech at the workshop I referenced published in the Journal of Breathing in that same year?

A. I am happy to accept that this is, indeed, that document. I don't really recognize

it. There is no reason to expect it's not.

THE COURT: Doctor, if you keep it off the microphone, it won't make that much noise.

Q. The paper is hitting the microphone.

A. Technology is always difficult.

Q. I think you turned to the right spot there, Page 7 at the bottom, right-hand column, third full paragraph down, starting with: The question also arises. Do you see that?

A. The first full paragraph down?

Q. The third full paragraph down. Do you see the paragraph that starts: The question also arises?

A. Yes. I'm sorry. I was in the wrong column.

Q. Got it?

A. Yup.

Q. See if I read this accurately: The question also arises as to the importance of involuntary smoking exposure and the development of heart and lung disease.

With respect to lung cancer, there is no evidence to indicate whether or not this level of exposure has an effect on the risk of developing

lung cancer, however, because of the low dosage and brief exposure, it would seem unlikely that there would be a significant increase in the risk in developing lung cancer.

The same situation occurs with chronic bronchitis and emphysema. On the question of the development of heart disease, there is some evidence that intermittent exposure to carbon monoxide, together with a high cholesterol diet, produces atherosclerosis, however, this evidence has been obtained in animal studies, and it is always difficult to determine what significant animal -- what significance animal experiments have for human disease.

That's what you said in 1975, isn't it, Doctor?

A. Right. I believe that is consistent with what I just said to you.

Q. And that is the way you felt at that time?

A. That is the way I felt as a representative of the Centers for Disease Control and the National Clearinghouse for Smoking and Health.

It was understood at that time that I

was representing that organization and they were extraordinarily reluctant to allow us to go beyond existing data or to expand beyond what the data actually showed for the disease in question, that is, they would not countenance our extrapolating downward from active cigarette smoke exposure to the lower dose exposures that occur with environmental tobacco smoking.

Q. They were requiring you to stick to the proof, in other words?

A. No, they were requiring us to stay within data that had been generated on populations for which that data was appropriate rather than doing the normal public policy approach, which is to extrapolate from populations with high-dose exposure to populations with lower dose exposure.

Q. I will give you a chance to talk about this extrapolation idea, but just to be sure we are clear, when you use that word, it's not -- by extrapolate, you mean predict from one set of data what something else is going to be? Is "predict" a fairly general term for "extrapolate"?

A. "Predict" is the wrong word. What you're doing is taking an observation in this case at one level or one set of levels of exposure and

you're saying: If this relationship to dose exists in a population of smokers, if we extend it downward to levels of exposure where we don't have people to examine, what would be the effect?

So you're extending downward the relationship between dose and effect, and that's very commonly done for all environmental regulation.

Q. Thanks. Doctor, you have been very active as an expert witness in lawsuits, haven't you?

A. I have testified a number of times. I think I've probably testified, in tobacco cases, eight or nine times over the last 15 years.

Q. And if we expand that to be both testimony in court and deposition and consulting with plaintiffs' lawyers, then we're talking about something more than 30 times, aren't we?

A. That's probably correct. I mean I don't have -- I don't keep a running tab on that.

Q. And, in fact, for several years now, hasn't approximately ten percent of your total annual income been from consulting or testifying by deposition or in court in tobacco cases?

A. It's probably close to that, a little

bit more, a little bit less some years. This case won't add much to me -- to my income.

Q. By the way, you do charge $350 an hour to the tobacco companies for taking your deposition?

A. My normal rate for medical expert witness testimony is $350 an hour, yes.

Q. Sometimes you charge the plaintiffs for that and sometimes you don't?

A. That's correct.

Q. And you tried to charge the tobacco company $500 an hour a few years ago to give your deposition in Mississippi, didn't you?

A. No, actually, I didn't. What happened was that the lawyer who was trying that case suggested that that would be the fee that I ought to request, and the Court, in its wisdom, decided that that was too much, and I was not reimbursed at that rate.

Q. Let me test your memory just a little bit with respect to these tobacco cases. You've been involved in them for about 20 years, haven't you?

A. I don't know about 20 but certainly a fair number of years, much more than 10.

Q. Do you remember the Browner case against R.J. Reynolds in California? You consulted on that one but, I think, didn't testify; is that right?

A. I don't actually think I even consulted on that. I believe that I was named as a witness but never reviewed records or consulted with an attorney on it.

Q. How about the Palmer case against Liggett in Massachusetts?

A. That was also a case in which -- I may have looked at a couple of records, but I never was deposed or testified or really discussed it extensively with any of the attorneys involved.

Q. And you testified on behalf of a man named Roiznen against R.J. Reynolds both by deposition and in court, didn't you?

A. I believe that's correct. That was in Kentucky, I think.

Q. And you've been listed as an expert and consulted in a number of smoking and health cases in Texas?

A. That's correct. I don't believe I reviewed any records or did any real consultation.

Q. Foren, Alston, Rock, Gibb, Carlyle,

Wood, and Dire?

A. I believe those were names of cases in which I was named but not ones where I did any work.

Q. Couple of cases in New Hampshire: Ganesis and Ramsey, Buckingham?

A. Again those were cases in which the lawyers listed me as an expert, but I did not do any work with those cases.

Q. You testified by deposition and in court in Wilks in Mississippi against American?

A. That's correct.

Q. And you've already been deposed in the Casteno case in Louisiana?

A. That's correct.

Q. And you've been deposed in the Moore case in Mississippi?

A. That's correct.

Q. And in Arch in Pennsylvania earlier this year?

A. Right, that's correct.

Q. Last year or the year before in Sackman in New York?

A. That's also correct.

Q. Of course, we've covered Rogers.

And the Bluwit case in Texas?

A. Yes, that's correct.

Q. And you were retained by Mr. Rosenblatt to testify in another case of his, Engle, aren't you?

A. I've agreed to testify in that case as well, yes.

Q. Aren't you noticed for your deposition in that case next week?

A. I believe so.

Q. Tuesday.

A. Although I wasn't clear whether that was going to happen or not given the delay in that case.

Q. Dr. Ernst Wynder is the -- you know who Dr. Ernst Wynder is?

A. I do.

Q. He's the doctor who did the mouse skin painting studies back in the '50s?

A. That's correct. He's the physician who first took tobacco tar, painted it on the skin of animals and showed that cancer developed in those animals. And that was, I believe, in 1953 or 4.

Q. And are you aware of the fact that Dr. Wynder considers relative risk under three to

be weak.

Doctor, I'll show you what the reporter marked as Defendants' J, Preventative Medicine is a peer-reviewed journal, isn't it?

A. Yes, it is.

Q. And do you recognize that author as the Ernst Wynder that we have been talking about?

A. That's correct.

Q. I'm going to read the last paragraph at the bottom of Page 139, the first page of the report. You see if I do this accurately.

This report is concerned with weak associations between some factor in disease and how we should interpret them.

It is not easy to define quantitatively what is meant by weak but Cornfield's view that any relative risk of under three might be considered weak is reasonable.

The important point to note, however, is that the closer the risk of some association comes to unity -- and unity means one, doesn't it?

A. Unity means one.

Q. -- the more likely it is that choice of the comparison standard, bias, confounding, or inappropriate analysis may explain it and the

greater the need for thorough understanding of the underlying biological mechanism.

Do you agree with that statement?

A. I agree with that statement, and I think you need to understand in this context, which is the way that this statement would be interpreted by scientists, is that the relative risk that they are talking about is the relative risk for cigarette smoking or exposure to cigarette smoke.

There, the relative risks are well over ten. If you are treating environmental tobacco smoke and something for which there is no known precedent, then you would have to treat it independently as a problem.

However, that's not the way it's appropriate to examine this issue. Tobacco smoke contains the same constituents, whether it's burned coming up from the tip of the smoke or whether it is inhaled by the smoker.

The composition is slightly different, but the chemical compounds are the same. The major difference is it's diluted in the room, and, therefore, you get a much lower exposure.

You would expect to see lower exposures in people who -- or lower risks in people who have

lower exposures.

For example, asbestos, which is widely established as a very strong lung carcinogen for lung cancer has many studies of occupations where there is a clearly accepted increased risk of asbestos exposure causing lung cancer where the relative risks are in the 1.3, 1.4, 1.5 range.

That's because the level of asbestos exposure is low. That doesn't mean that it doesn't cause cancer in some individuals. It means it simply causes less cancer. So the relative risk that they are talking about here is the risk of exposure to tobacco smoke, and that's a relative risk that is over ten.

Q. Dr. --

A. The fact that it has a relative risk of 1.19 for environmental tobacco smoke is nothing more than a statement that the levels of exposure to tobacco smoke that occur in involuntary smoking situations are smaller than the levels of tobacco smoke that occur in active smoking situations.

Q. That's very interesting, Doctor, but does he say some relative risks of under three might be considered weak, or does he say any relative risk of under three might be considered

weak?

A. What he says, as I read this as a scientist, is: This report is concerned with weak associations, plural, between some factor and disease, that is examining a body of literature that relates --

Q. Wait a minute. Now you're --

A. An exposure.

Q. Wait a minute, Doctor. Just for the record, be sure you're clear on when you are reading and when you are interpreting, okay?

A. Okay. What that means is, my interpretation of this as a scientist --

Q. Okay.

A. -- is that he's looking at the body of epidemiologic studies that relate a factor to disease. That's the way scientists do this. Everyone understands that the risk is proportional to the amount of exposure or the difference in exposure between an exposed group and a controlled group.

If that difference is small, if the exposure is small, then the relative risk should be small, and the way that this is done in the scientific literature is to look at all of the

studies that look at the relationship between an exposure to an agent at all levels and see whether there are studies that show relative risks greater than three for high exposures.

That gives you great confidence that this exposure is occurring in conjunction with the disease, not by chance or by confoundment once you have done that and you're now interested in answering the question of whether low levels of exposure cause disease, if you're looking at low levels of exposure, you should expect to see low relative risks.

Q. Doctor, how many of the 11 U.S. studies that the EPA looked at to calculate the relative risk of 1.19? How many of those 11 showed a statistically significant increased risk?

A. I believe that the global risks in those studies, which were not all of the studies the EPA examined -- the EPA examined some 30 studies. Those --

Q. Wait a minute. My question was --

A. I understand.

Q. -- of the ones they examined to do -- to calculate the risk of 1.19, and that is 11 studies, isn't it?

A. My understanding is that that is 11 studies.

Q. Okay. Go ahead. How many of those 11?

A. The global risks in those studies for all exposed versus non-exposed, it may have been one or there may have been none that were statistically significant. That has to be put in context with all the studies that were examined in the fact --

VOICE: Your Honor, I think that question can take a yes or a number answer, can't it? Your Honor, I asked him how many of the 11.

THE COURT: If he can answer the question, that would be fine. If he has to explain his answer this way, you can explain.

THE WITNESS: I think it's important to know that in several of those studies, when the higher dose exposure was examined, it was statistically significant.

So when you mixed everybody together, you didn't find a statistically significant result, not surprisingly given the low level of exposure you're looking at.

But when you looked at those individuals

that were exposed to higher levels of environmental tobacco smoke, my recollection is that one or more of the studies did show statistically significant results.

I will also add that that was not the purpose of that analysis. The purpose of that analysis was to try to find the magnitude of the risk that would be estimated for the general population rather than to do what you suggested in this paper, which is to draw a causal association.

Q. Now let's talk about extrapolation. You spoke about that a little bit on direct examination and again this morning before we broke for lunch. You really can't extrapolate from mainstream to ETS, can you?

A. I have -- that statement is incredibly broad. Extrapolation is commonly done. It's possible to do it. They are quite similar agents. I'm not sure what you're saying when you say you can't extrapolate.

Q. Well, let me put it this way: Didn't the '86 Surgeon General's Report say you had to look at them separately and also the two '86 NRC reports?

A. What they said was that these were agents that were fundamentally similar. They contained the same constituents. There were composition differences.

There were -- actually because of the temperature at which environmental tobacco smoke is generated, it's not as hot.

When you draw through the cigarette, you create a very bright coal, a high heat cone from which you burn the tobacco.

That completes combustion a little bit more, so when you generate the smoke that curls up from the tip in between puffs, you actually get less complete combustion.

And if -- you get more of the organic compounds and some of the irritants in the smoke, so there's some difference in composition, and the big difference of course is that you spread it out over an entire room before you inhale it as opposed to inhaling it directly as a stream.

So there are a number of differences that need to be examined, but that's not to say that the differences are such that you cannot compare the two because as far as I am aware, most of the groups that have looked at this issue have

drawn heavily on the data for active cigarette smoking.

Q. And you recall that you have spoken on the subject and acknowledged that because of the qualitative difference in smoke inhaled by the nonsmoker, the health effects are likely to differ from the effects of the same quantity of smoke received by actually smoking cigarettes and we must therefore approach the possible health effects of involuntary smoking as a problem separate from that of voluntary smoke?

A. That's correct. I said that, I believe, in --

Q. 1975 --

A. 1975.

Q. The Third World Conference?

A. That was the position, again, of the Office on Smoking and Health at that time, but you had to be very conservative in any statements, which was --

Q. Well, you believe that, didn't you?

A. I believed that we needed to look at the differences, that's correct.

Q. You mean you weren't making a statement that you didn't believe because you were speaking --

A. If you would allow me to complete my answer, I would be happy to try and complete it.

Q. Sure.

A. And then you can ask me any questions that you think are incomplete.

Q. Sure.

A. My belief at that time was that it was important to examine those differences. To the extent that the differences are substantive, to the extent that they are quantitative and qualitatively quite distinct, they need to be taken into account as you look at the data.

We did examine that subsequently. We examined it actually over the next 15 years, looking at detail of the differences between environmental tobacco smoke, its composition, the side-stream smoke, which is the smoke that curls up from the tip of the cigarette, in comparison to mainstream smoke.

Having examined that, the conclusion is that there are some compositional differences but that the same toxic and carcinogenic substances that are present in mainstream smoke are present in environmental tobacco smoke and that for all intents and purposes the qualitative outcomes

should be similar.

Therefore, the additional data that became available clarified that statement.

Q. You said you were speaking on behalf of the Office of Smoking and Health. That's why really when you said that, that's the reason I was curious because my question is: Did you mean what you said in 1975?

A. I meant what I said as a conservative scientist, that's correct.

Q. All right. Thank you.

Now as I understand your personal goal as well as your professional goal with respect to cigarettes, it is to have a smoke-free society; isn't that right?

A. No. As I've said many times, my professional goal is not to have people die of lung cancer, chronic obstructive lung disease and other diseases.

If, in order to achieve that goal, we need to have people stop smoking and we need to have the tobacco companies shift out of manufacturing tobacco and into other industries in order to accomplish the reduction in death and disability that's produced in order to save

400,000 lives, I think that that's a reasonable accommodation or a reasonable goal for society, and, yes, that is my professional goal is not to ever have to tell another patient that they're going to die of lung cancer.

Q. And I understand you prefer to put it that way, and I know you've given a lot of depositions. I'm not trying to confuse you with this.

But haven't you stated repeatedly in the past that one of your goals is to have a smoke-free society?

A. A smoke-free, yes, I have said that, a smoke-free society as defined by Dr. Koop, is a society in which no one is involuntarily exposed to tobacco smoke.

And, yes, I think that that is a goal, that people who don't smoke and don't choose to smoke and aren't addicted and don't plan to become addicted to cigarettes are able to avoid the toxic and carcinogenic exposures, that they don't have to put themselves at risk as part of the daily process of being in society.

And that's what I think the goal of a smoke-free society is. It's to enable people who

don't want that exposure not to have to be subjected to it.

Q. And informational campaigns are not enough to achieve that in your view?

A. Informational campaigns are one component of the process by which you achieve it. They alone, particularly given the tremendous access to media and the ability to advertise that the tobacco companies have, they alone have not been successful in accomplishing that.

Q. So there are, in your view, not enough, right? That's my question.

A. They have not been sufficient. There are additional components that are necessary in order to accomplish that, in order to allow people that access.

Q. Do those include in your view advocating restrictions on smoking as a way to help smokers quit?

A. That's correct. That's a separate issue, but in order to protect people from secondhand smoke exposure, one of the things that's necessary is to define the way norms or expectations are set in society.

One of the things that happened when you

go into a restaurant is if there is a no smoking sign, then a smoker is likely not to smoke.

If, on the other hand, there's no restriction, then the smoker is likely to smoke and they expose everyone around them.

So one of the things that were found that enables protection of nonsmokers from environmental tobacco smoke is having regulation passed that separates people, it prevents the exposure, that asks smokers to step outside if they want to smoke or that has people who smoke sit in a separately ventilated environment.

And, yes, I've supported that type of regulation in an effort to protect nonsmokers and in an effort to achieve a smoke-free society.

Q. Doctor, haven't you said in the past that, in your view, the segregation of smokers in smoking sections has become a social rejection of the smoker and has established a strong social stigma to the active smoking, separation and a need to request permission to smoke become barriers to the sociological utility of smoking and the repetitive need to define oneself as a smoker by requesting a smoking section becomes a persistent sociological assault on the smoker's

self-image?

A. Yes, I think that that is correct.

Q. That's your view?

A. When you separate people, those kinds of processes happen.

Q. What --

A. If you allow people to smoke together, what you do is to provide a positive social reinforcement for people smoking.

When you separate people, you provide a negative social reinforcement. People have to separate themselves. People are in different environments. That's necessary in order to protect the nonsmoker, and, yes, it has an effect on the smoker. The smoker doesn't like the concept of being separated.

Q. So, in your view --

A. But that does not mean that the sole goal or the value, if you will, of a separate section or protections for nonsmokers is to achieve some kind of denigration of the smoker.

Q. And part of your purpose, goal, idea on achieving a smoke-free society is to make it difficult for a smoker to find a place or an opportunity to smoke and to make it embarrassing

or shameful to him so he won't want to smoke; isn't that right?

A. I would not use the words "embarrassing" and "shameful." I think it is appropriate to encourage people to quit, particularly given the difficulty that smokers have in quitting.

I think it's important to provide as much social reinforcement for that cessation attempt, if possible.

And I think it is appropriate for society to say: We are not going to encourage smoking as a behavior.

And if we have to make a choice between smokers and nonsmokers, then we will act in a way that discourages smoking in order to protect nonsmokers. I don't think that there is a direct effort to hurt smokers.

There is an effort to try to create an environment that encourages those individuals to quit and that once they try to quit, it creates a social environment that allows these people to be successful.

Q. Okay. Thank you very much, Doctor. That's all I have.

A. Okay.

REDIRECT EXAMINATION

Q. There is, as you can see, a diagram of a skeleton, and there is certain diseases mentioned --

A. Yes.

Q. -- in connection with the diagram.

Now are these diseases that you said in your speech were the result of smoking?

A. I don't know whether I actually covered all of those diseases. They are some of the diseases that are caused by smoking. Some of them are chronic diseases.

Some of them are things like peptic ulcers, and some of them are things like accidents where there is an association, but it's not felt that the cigarette smoking itself causes the accidents, just that smokers are more likely to have accidents. So there is a mixture of things that are caused by smoking and associated.

Q. Was that skeleton diagram, was that actually part of your talk, or is that something --

A. No, it was not. That was a piece of editorial license by the folks who chose to put out that magazine. I might add that that is not a

peer-reviewed journal.

Q. Yeah, but I mean you're not -- do you question the fact that it accurately reflects what you said in that speech?

A. No, I think the transcription of the text is probably accurate.

Q. Is accurate, okay.

Now -- and you have it in front of you?

A. No, you have it in front of you.

Q. Okay.

Is that an extra copy?

Right. Thank you.

Okay. In the very first paragraph toward the end: It can be considered smoking, referring to secondhand smoke?

A. Correct.

Q. You say it can be considered smoking --

A. Yes.

Q. Excuse me.

You say, referring to secondhand smoke, it can be considered smoking because the nonsmoker is exposed to many of the same substances in cigarette smoke that the smoker is exposed to, and it is involuntary because the exposure occurs as a

part of the necessary act of breathing. That's what you said at that time?

A. That's what I said at that time.

Q. And that certainly applies to flight attendants, correct?

A. Absolutely, unless the flight attendant can't breathe, and we haven't found out a way to do that yet. It is an obligatory act of the normal breathing pattern, obligatory consequence of the normal breathing pattern.

Q. Now in the last paragraph on that first page, you say: First, let us realize that the smoke inhaled by nonsmokers in cigarette smoke polluted in environments differs in composition from the cigarette smoke inhaled by smokers.

It differs primarily for two reasons. First, side-stream smoke or that smoke which emanates from the burning cigarette tip and is released directly into the atmosphere contains two and one-half times the nicotine and carbon monoxide and over 100 times the ammonia of mainstream smoke where that smoke which is drawn through the cigarette of the smoker.

Second, the smoker acts as a very effective filter and removes almost all of the

particulate matter and over half of the carbon monoxide from the inhaled smoke.

Now does that information hold as good today as it did back in 1975?

A. Yes, and I thought actually that that's what I said earlier, maybe a little less artfully. When you change the temperature of combustion, you get higher yields of these other products.

Q. Now Mr. Hardy, before the lunch break, I think very early on in his cross-examination of you referred to another case where he had cross-examined you, I believe. That was a case in the State of Indiana?

A. That's correct.

Q. Where you testified as a witness for the plaintiff?

A. That's correct.

Q. I was not involved in that case?

A. No, you were not.

Q. Have your opinions evolved on the issue of secondhand smoke since you gave this presentation in 1975, and if so, how?

A. Absolutely. I mean they have evolved in two very important ways. Number one, more

information has been available.

And, therefore, I can look at much more detailed descriptions of what's in smoke, how much smoke there is in the air, how much nonsmokers absorb from that air, smoke constituents, and the epidemiology of that exposure, how much risk, how much disease that occurs in people who have that exposure so there has been a wealth of additional data that that has been generated since that time, since 1975.

And the second is I've become perhaps more experienced and more seasoned in public health, and have had the opportunity to try and look at this exposure in the context of other exposures in our society, things like occupational exposures, things like atmospheric air pollution.

And, therefore, have come to the realization that this exposure should be really examined in that context rather than in the context that isolates and separates environmental tobacco smoke exposure from the data on active smoking.

Q. To your knowledge, Dr. Burns, has any physician or scientist anywhere in the United States had more involvement with the Surgeon

General's reports over the years as author, scientific editor, and reviewer than you have?

A. Not to my knowledge, no.

Q. Your position -- is your position on smoking and health issues readily available to anyone who searches the literature and who reads the Surgeon General's reports?

A. Absolutely.

Q. Now, Dr. Burns, with respect to secondhand smoke, isn't it true that the control group is not truly unexposed because everyone is exposed at some level or another to secondhand smoke?

A. That's correct. One of the prerequisites of a study where you have people is you have to have a difference in the exposure between the two groups of people, and one of the difficult aspects of doing studies on environmental tobacco smoke is all of us have some level of exposure.

Everybody has been in a smoky room at some point in time and so the difficult part about doing those studies was to find groups that you could clearly distinguish as having different exposures and the one group where you can most

clearly distinguish that are people who are married to smokers.

It's not that the people who are married to nonsmokers don't have exposure to entire environmental tobacco smoke.

It's that you can be relatively certain that people who are exposed at home because their spouse is smoking have a higher level and so it's actually that difference in exposure that you're testing in the epidemiologic studies.

To the extent that you're looking at studies in the U.S. where the woman whose husband smokes is likely to work, is likely to be out in a work environment, goes out shopping and having lots of other social activities, the difference can be relatively small based on how long they spent at home.

And that's one of the reasons why some of the studies were done in more traditional societies such as Greece or Japan where the woman tends to stay at home and much of her social exposure is limited to her husband.

And, therefore, the difference between the nonsmoking -- the wife of a nonsmoking husband and the wife of a smoking husband in terms of

their exposure to environmental tobacco smoke is bigger, and, therefore, the risks would be bigger.

As I said earlier, the measure of relative risk, the measure of difference in risk is proportional to the difference of exposure of the two groups you're looking at.

The bigger that difference, the bigger your relative risk. That's true for environmental tobacco smoke. If you can get a group that has almost none and compare it to a group that has high level exposure, you'll get a bigger relative risk.

And that's true for active smoking in comparison to people who don't smoke when the difference in exposure is very big, therefore, your relative risk is very big.

Q. So that in terms specifically of the relative -- how does that impact the relative risk when nearly everyone in America is exposed to secondhand smoke? Does it understate it or overstate it?

A. Oh, it's understates the relative risk and in many studies fairly substantially.

Q. Are there more carcinogens,

cancer-causing compounds and chemicals in side-stream smoke or in mainstream smoke?

A. They're essentially the same chemical compounds. The concentration, if you will, or the way it's best expressed, the amount of these compounds produced per gram of tobacco burned is higher in side-stream smoke.

The smoke is diluted in a much larger volume, but the production, if you will, of carcinogens of side-stream smoke is higher.

Q. Dr. Burns, you've been at this for over 20 years, smoking and health --

A. That's correct.

Q. -- trying to point out to the American people the dangers of smoking, the dangers of secondhand smoke.

What is your basic motivation? I mean do you dislike smokers? What are you trying to accomplish?

A. Well, I'm a physician, and one of the things you do as a physician is you take direct care of people.

You actually get to sit there at the bedside and watch people and watch and try and relieve the suffering that they have. You try to

make their lives better. You try to make them more comfortable.

And in internal medicine, often you lose them, and it's a very difficult and painful process as a physician to lose a patient that you're taking care of and often care for a person.

To have that happen when it didn't have to happen, when it was preventable, when it was unnecessary, is something that tears at your heart strings.

And how any physician who cares for their patients could know as much as I know about tobacco and health and not try to change that would be beyond my understanding of how that person could be a physician.

It's my belief that being a physician places a burden on you as a professional and as a person to try to make the world around you a better place, both one on one with patients and in the community in which you -- communities in which you live by reducing the things that cause disease.

Q. Thank you, Doctor.

THE COURT: All right, Doctor, you may

be excused. Thank you very much. Appreciate it.

THE WITNESS: Thank you.

(Whereupon, the playing of the videotaped deposition of Dr. David Burns was concluded.)

THE COURT: I thank you for your patience. It's ten minutes after 4. We'll be in recess until 4:25. I won't work you too late tonight, but I would like to do at least a little bit more work after that, so 4:25, just leave your notebooks on your chairs. I'll see you outside the courtroom in 15 minutes.

THE BAILIFF: Rise for the jury, please.

(The jury left the courtroom.)

THE COURT: Mr. Hunter, your next witness is going to be who?

MR. HUNTER: A videotape of Dr. Lumry, which is about --

THE COURT: Any documents or exhibits that come in during that testimony?

MR. HUNTER: We'll offer his record in.

MR. WILLIAMS: One.

THE COURT: Any objections to those

records?

MR. REILLY: No, Your Honor.

THE COURT: All right. And about how long will that take?

MR. HUNTER: One half hour.

THE COURT: And did you also intend to put on Mr. Leone -- Ms. Leone?

MR. HUNTER: No, we'll have to do her tomorrow, Judge.

MR. KODSI: Your Honor, we have a few more issues to resolve with her. I don't know if you want to do it tonight or early morning.

THE COURT: No, tonight because I have motion calendar in the morning.

MR. KODSI: Sure.

THE COURT: So we'll put on that one-half hour testimony and we'll figure out the legal issues so we'll be in recess for 15 minutes.

MR. UPSHAW: Thank you, Your Honor.

(A recess was taken at 4:15 p.m.)

(On the record at 4:39 p.m.)

MR. REILLY: I have now handed to Your Honor page and line designations with very

limited objections to the Wurmlinger deposition, and, Your Honor, I think we've already delivered to you a while ago our memorandum in support of the medical records that we want to submit in this case.

THE COURT: Yes, I have that.

MR. REILLY: And I have a little supplement to it that relates to the admissibility of testing results.

THE COURT: Okay.

MR. REILLY: If I could hand that up to Your Honor, I'd appreciate it, and I've given a copy of that to the plaintiffs.

THE COURT: And in turn I have the rulings on the objections to Chad Ahrendt's testimony.

MR. UPSHAW: Right. Which for the record I handed you during the Burns' deposition.

THE COURT: Yes, it's now complete here for the defense, the plaintiff, and for the clerk.

MR. WEINSTEIN: Judge, for your much in advance convenience, I will give you these cases two days in advance.

THE COURT: Great.

MR. WEINSTEIN: And they're highlighted. They said it's okay. I gave them highlighted versions too, without argument.

MR. REILLY: Your Honor, I'll have a response to that obviously.

THE COURT: Tomorrow?

MR. REILLY: Tomorrow is fine.

MR. WEINSTEIN: Do you have cases?

MR. REILLY: Sure, there's a response.

THE COURT: Also Ms. -- I don't even remember -- I don't know if you remember Ms. Gee or Gree, Gee, I guess, Ms. Gee who was one of the prospective jurors who did not appear on the second day had called chambers.

We found it on the machine, and she's also submitted a letter saying she was ill and was at the doctor's with documentation from the doctor.

MR. KODSI: We'll forgive her.

THE COURT: Yes, she's forgiven. I don't know if you want me to file that or not.

MR. UPSHAW: (Shakes head from side to side.)

THE COURT: Pitch it?

MR. HUNTER: No, that's all right with us.

Judge, Plaintiff's 1K has been admitted without objection. It's a medical record of Dr. Lumry. I've made a copy for each of the jurors and I'd like to give it to the jurors as they watch the video of Dr. Lumry. It's his medical record.

THE COURT: Okay.

MR. REILLY: I don't really have a problem with giving a one-page document to the jurors, but the idea of handing the jurors every exhibit that we are going to use in this case is --

MR. WILLIAMS: We won't do that.

MR. UPSHAW: Your Honor --

THE COURT: It makes it harder for them to concentrate sometimes.

MR. UPSHAW: Also, Mr. Hunter -- I don't know if he had a chance to finish, had been identifying for us just now the documents he wishes to enter into evidence. As soon as I

get the opportunity here, I will have those noted so that we can raise any objections to the documents.

THE COURT: These are documents that you intend to introduce tomorrow?

MR. UPSHAW: I hope not.

MR. HUNTER: No.

THE COURT: Good.

MR. HUNTER: They're, for the most part, company documents, Web site documents, similar to that which we took up this morning, and I can argue them as soon as Mr. Upshaw is prepared and understands out of the many that we've listed which are actually being offered, I can argue them whenever the Court desires.

THE COURT: All right.

MR. REILLY: Judge, for your benefit, depending upon the document, it may not have -- I mean there's not a universal -- there may be some universal objections but there will be individual document objections, so it's a lot better if we know sooner rather than later which documents so that --

THE COURT: I agree.

MR. HUNTER: I'll give these to Gary so that he can hand these out and I don't have to --

THE COURT: Yes.

MR. KODSI: Your Honor, in the interest of saving you from reading another ten pages, you don't need to rule on any of those objections on Dr. Stroschein. We said we were going to try to agree to --

THE COURT: That's not what I just went through, is it?

MR. KODSI: No, we told you not to worry about it until later. We saved you about 12 pages there.

THE COURT: Thank you. I'll take whatever I can get.

We're ready for the jury.

Now the designations by the plaintiff of Dr. Stroschein taken -- of the deposition taken on June the 25th --

MR. WILLIAMS: Yes, Your Honor.

THE COURT: -- you have not registered any objections yet; is that correct?

MR. KODSI: They're on their way.

THE COURT: They're on their way.

MR. KODSI: That's what they're talking about right now.

THE COURT: I was going through all this. I thought these were the objections. I was overruling them.

MR. KODSI: Well, if you want to overrule the designations, that may save us some time of worrying about objections, Your Honor.

THE COURT: I got through the whole thing before I realized these were the designations, not the objections.

THE BAILIFF: Rise for the jury, please.

(The jury entered the courtroom.)

THE COURT: You may be seated. Mr. Williams, you can call the next witness.

MR. WILLIAMS: Judge, at this time we'll play the videotape deposition of Dr. William Lumry. It's fairly short.

THE COURT: Yes. This testimony is going to be approximately 30 minutes, and after this testimony, we'll recess for the day.

(Whereupon the videotaped deposition of Dr. William Lumry was played as follows:)

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Doctor, good afternoon. Would you please tell us your full name and your professional address?

A. My name is William Raymond Lumry. My office is located at [DELETED]

Q. Dr. Lumry, as you know, my name is Stuart Williams, and I represent Suzette Janoff in the lawsuit that's pending here in Miami-Dade County; is that correct?

A. Yes, sir.

Q. Have you and I had any discussions concerning this case, sir?

A. Your secretary has had several discussions with my secretary in arranging the deposition. You and I spoke briefly for maybe five, ten minutes. I believe it was last Friday, noon.

Q. All right. Have I retained you as an expert in this case or just merely asked you to give a deposition concerning your care and treatment concerning the plaintiff?

MR. REILLY: Object to the form of the question.

THE WITNESS: You did not ask me to form -- to prepare as an expert. I was a treating physician for this patient.

Q. (BY MR. WILLIAMS) Doctor, could you please tell the members of the jury a little bit about your background, if you could give us your educational background?

A. I attended Texas A&M University and graduated in 1973 with a degree in mechanical engineering. I subsequently attended the University of Texas Medical Branch in Galveston between 1973 and '77 and graduated with a Doctorate of Medicine.

I subsequently trained at Washington University School of Medicine in St. Louis and did an internal medicine internship and residency at the Jewish Hospital of St. Louis.

I then did my allergy fellowship and research fellowship at the Scripps Clinic in La Jolla, California. In 1982, I moved to Dallas and opened my clinical practice here.

Q. Doctor, do you practice by yourself or do you have partners or associates?

A. I practice by myself.

Q. And are you board certified?

A. I'm board certified both in internal medicine as of 1980 and in allergy and immunology as of 1983.

Q. Doctor, I understand that you only have one note or one record concerning Ms. Janoff; is that correct?

A. That's correct.

Q. All right. Let me direct your attention to the first and only time that I believe you saw her. Do you know when that is?

A. The date of the record that I have is November 23rd, 1987.

Q. All right. And is the record in front of you?

A. Yes, it is.

Q. All right. Could you tell us what the reason was for Ms. Janoff to see you on that particular date?

A. I -- let me just read the history that I have on the -- on the patient encounter form. At the time Ms. Janoff was a 30-year-old female who complained of a five-year history of rhinitis, and by that, I mean basically nasal stuffiness,

drainage.

In parentheses is written that her symptoms began after becoming a flight attendant. She has had several episodes of sinus infection and ear infections and then two weeks prior to her visit with me in November, she began having trouble swallowing and a heavy chest.

Q. Is a history something you take from all the patients you see?

A. Yes, sir.

Q. Did you -- do you conduct examinations of the patient when you see them?

A. Every patient is examined, yes, sir.

Q. All right. Did you do that in this particular case?

A. I did.

Q. And the findings of your examinations, are those reflected in the top right corner of your chart?

A. Yes, they are.

Q. Could you tell us what you examined on Ms. Janoff and what your findings were, sir?

A. I did her -- well, basically her head and neck and lungs were examined. She had normal appearing eyes. Nothing appeared to be abnormal

there.

Her left ear membrane, her left tympanic membrane was retracted suggesting that she had some blockage in her left Eustachian tube again probably related to the ear infections that she had had previously.

Her nose was minimally swollen and somewhat pale. There was no evidence of any infection there. There was drainage in the back of her throat. The lungs were completely clear.

She didn't have any rash or other skin problems, and then we also did what is known as a nasal smear.

We collected a bit of mucous that she blew out of her nose and examined it under the microscope for allergy cells and infection and found neither.

Q. Okay. If she had had an allergy or an infection at the time, is that something you would have found?

A. I think her physical examination would have been different had she had an ongoing allergy reaction at the time.

Q. All right. Doctor, did you -- after you examined Ms. Janoff, did you give her a diagnosis

for her condition?

A. Based on the clinical history of just an ongoing symptoms without any seasonal variations with a relatively normal physical examination except for her blocked ear and a normal nasal smear, I gave her a diagnosis of what's known as vasomotor or irritant rhinitis, which just simply means that the nose is irritated by nonallergic things, irritating smells, chemicals, dry air, et cetera, and then she also had some throat irritation relative to that.

Q. Okay. Did you make any recommendations concerning any exposure to any irritants?

A. Well, I made several recommendations to her. She, at the time of her visit, was taking an antibiotic for her ear infection and a decongestant and mucous thinning agent, and I encouraged her to continue those.

I also gave her an antihistamine containing medication to try to dry up the drainage in her throat at night. I told her that she could use any one of a number of saline nasal sprays to try to sooth her nose and rinse any irritation out of them, and then I also made the recommendation that if possible, she should avoid

exposure to cigarette smoke.

Q. Doctor, being an allergist, is cigarette smoke an irritant?

A. Cigarette smoke is a respiratory tract irritant, yes, sir.

Q. Is there a difference between vasomotor rhinitis and allergic rhinitis?

A. The difference is -- to answer your question, yes. The difference is in allergic rhinitis, one's immune system mistakes pollen or dust or an animal dander for something that's harmful, develops an immune response to that.

And then when the individual gets exposed to that particular substance, then a reaction occurs and the symptoms of allergic rhinitis occur, sneezing, itching, runny nose and nasal blockage.

In someone who has an rhinitis, there's no apparent immune system sensitization or involvement with the reaction. It's simply the substance is irritating to the lining in this case of the nose or of the eyes or the throat, and the symptoms are driven by that irritation.

Q. Doctor, do people with allergic rhinitis usually have a positive family history for

allergies?

A. Approximately 50 percent of the time individuals that have allergies have a genetic predisposition, yes.

Q. But individuals that have allergic rhinitis respond favorable to antihistamines and corticosteroid medications?

MR. REILLY: Object to the form.

THE WITNESS: The treatment for allergic rhinitis can include an antihistamine, a decongestant, or topical steroid nasal sprays. And to answer your question, yes, individuals with nasal allergy typically do respond to those treatments.

Q. (BY MR. WILLIAMS) Doctor, do you know whether someone who has a chronic vasomotor rhinitis can develop chronic sinusitis?

MR. REILLY: Object to the form.

THE WITNESS: The problem or the occurrence of sinus disease basically happens when the sinus cavity or the opening to the sinus cavity becomes blocked.

That blockage is usually caused by the swollen lining of the nose or of the sinuses themselves. That swelling can be the result

of allergies.

It can be the result of virus infections like a cold. It can be the result of irritation of the lining of the nose.

Q. (BY MR. WILLIAMS) I guess what I'm trying to ask you is if you have an irritant in your nose and you're diagnosed with vasomotor rhinitis, can that eventually lead to -- that blockage in the sinus cavity, result in the sinus infection or sinusitis?

MR. REILLY: Object to the form.

Pardon me, Doctor.

THE WITNESS: Can I answer the question?

MR. REILLY: Yes.

THE WITNESS: Yes, it can.

Q. (BY MR. WILLIAMS) All right. Doctor, was that the only time that you saw Ms. Janoff?

A. That's the only record I have, and according to the billing record, apparently it was the only time that we saw her.

Q. All right. Doctor, do you charge for your professional services such as giving a deposition?

A. I do.

Q. And can you tell the members of the jury

what your rate is?

A. My rate for the first hour is $500, and then $400 for every hour thereafter.

Q. All right. And is that customary for individuals in your specialty in the Dallas area?

A. Yes, it is.

Q. All right. Doctor, I don't have any other questions for you. Thank you.

A. Thank you.

CROSS-EXAMINATION

BY MR. REILLY:

Q. Doctor, I'm Ken Reilly, and I won't have too many questions for you myself, I don't think, but can I see your -- you have a file with you, don't you?

A. That's correct.

Q. Can I just see that real quickly and I'll hand back your one page of medical records.

Let me give you that back.

A. Thank you.

Q. Doctor, I think you indicated that you saw Ms. Janoff -- who at that time was known as Suzette Ahrendt?

A. That's correct.

Q. -- on one occasion, correct?
A. Yes, sir.
Q. And you didn't get any medical records from any health-care provider who was caring for her before she came to see you?
A. I did not.
Q. Okay. And as a matter of fact, the record that you have in front of you today has been discarded and you had to get it from some other source, correct?
A. That's correct.
Q. I think you got it from the plaintiff's lawyer in this case?
A. He provided it, yes.
Q. Okay. And not only did you not have any prior medical records, but you've not been provided with any subsequent medical records regarding the care and treatment of Suzette Ahrendt Janoff, correct?
A. I have not seen anything else, no, sir.
Q. Okay. So you don't know to what extent she has been seen by other allergists?
A. No, I don't.
Q. Or whatever other allergy testing may have been performed on Ms. Ahrendt Janoff?

A. I have no -- no information at all about her treatment.

Q. And you didn't actually do any lengthy allergy testing on Ms. Janoff, did you?

A. No, we did no testing. The only test we did was the nasal smear.

Q. Okay. When you saw her, she reported to you episodes of sinusitis/otitis, correct?

A. That's correct.

Q. But when you examined her, you didn't find evidence of sinusitis, did you?

A. No. It's difficult to see on physical examination. She did have the blocked ear tube, but that was the only positive physical finding we had.

Q. Okay. And blocked ears can come about as a result of changes in pressure, can't they?

A. That's correct.

Q. And flight attendants experience changes in pressure when planes ascend and descend, correct?

A. They do. If your Eustachian -- if I may explain, if your Eustachian tube is working properly, then that pressure is equalized essentially instantaneously.

If there's something that's causing swelling in the Eustachian tube so that it can't open appropriately, then you can see evidence of a negative pressure in the ear by retraction of the eardrum.

Q. And that happens -- airplanes are pressurized, right?

A. They are.

Q. But they're not pressurized at sea level, are they?

A. They're pressurized, I believe, at 5,000 feet.

Q. Do you know anything about Ms. Ahrendt Janoff's experience with communicating with pilots of the airplanes that she was flying on as to whether or not the equipment was working properly in terms of pressurization of her airplanes?

A. I have no information about that.

Q. Okay. In fact, just to be candid about it, you don't know whether she'd ever had sinusitis before coming to see you or not, right?

A. Only by her history, no, just by medical history.

Q. Okay. And whether or not she'd ever had otitis or otitis media, again, is just by her

history to you?

A. That's correct.

Q. She reported to you that two weeks before coming to see you, she'd begun to have trouble swallowing?

A. That's correct.

Q. Did you identify a reason for her to have difficulty swallowing?

A. The presumed reason was the infection that she had been treated for four days before she came to see me.

One of the common symptoms of a sinus infection is postnasal drainage which then leads to a soreness in the throat and oftentimes difficulty swallowing and sort of heaviness or fullness in the throat and my assumption was -- and as I mentioned she was on an antibiotic, had been on it for four days, which may have cleared up many of her signs, physical signs of infection when I actually examined her.

I just assumed that her throat irritation was a result of the sinus infection and treatment had already been started on when she came in my office.

Q. Okay. So, in fact, she may have had a

bacterial agent that caused her infection?

A. I believe so, yes.

Q. Okay. And that may be why she had her rhinitis, because of a bacterial infection in her nasal passage?

A. I think her sinus infection and her ear infection was probably driven by a bacterial infection, but the rhinitis, no, I don't believe so.

Q. Okay. Vasomotor rhinitis, is that a term ordinarily used by physicians indicating a rhinitis of unknown etiology?

A. It's a known etiology. We know that it's a rhinitis that's caused by exposure to irritants and some people are much more sensitive. Cold air, smelly air, smoky air, et cetera, they have a much more dramatic reaction to that with runny nose, stopped up nose that individuals -- than normal individuals, so actually when they have exposure, they have nasal symptoms, where you and I may not have those symptoms.

The vasomotor component just differentiates it from an allergic type or infection-driven rhinitis.

Q. Rhinitis means your nose runs?

A. Rhinitis means that there's inflammation or irritation in the lining of the nose. The symptoms that you may get from that may go from nasal blockage to an irritated feeling in the nose to sneezing to runny nose to drainage down the back of your throat, but the word "rhinitis" means nasal inflammation or irritation.

Q. When you examined her, when you looked in her nose, you saw, I think it says minimal swollen --

A. Her nose was minimally swollen and the lining was pale, meaning it wasn't bright red and infected looking at the time that I examined her.

Q. Okay. And you found drainage. Did you characterize the drainage? Was it clear?

A. I did not characterize it.

Q. Okay. Was it -- did you characterize the volume of it, in other words, minimal --

A. I did not, no.

Q. Okay. You indicated that you didn't actually identify whatever the irritant was, correct?

A. That's correct. There's no way to do that.

Q. You proposed that she rinse her nose, if

dry, with Salinex, Ocean, or --

A. Ayr, A-y-r, or Humist.

Q. Those are all brand names?

A. Those are all brand names of saline -- over-the-counter saline nasal sprays.

Q. You recommended that she complete her Augmentin?

A. That's correct.

Q. And you recommended that she avoid cigarette smoke if possible?

A. That's correct.

Q. Do you know if she followed your advice?

A. No idea.

Q. You told her to return if she needed to?

A. That's correct.

Q. Did she ever return?

A. I did not see her back.

Q. Did she ever communicate with your office again?

A. She may have, but I do not have record of that. We keep our phone contact records on a progress sheet, and I don't have her records. This is 15 years ago, so I don't have those records in-house.

Q. I understand.

You anticipated that her condition would resolve?

A. I hoped that with prudent avoidance of things that we felt she felt were irritating to her and clearing of the infection, that she would do better, yes.

Q. Do you know of any way for a flight attendant to avoid dry air?

A. No.

Q. Could you determine based on your examination of Ms. Ahrendt Janoff on this day how long her rhinitis that you saw had existed?

A. Only by her history, only by the fact that she said: For five years I've been having a problem, but there's no way to tell from a physical examination standpoint how long something has been present.

I mean when physicians see patients, they take a history and have to believe the history that's provided as being true.

Q. Did you ask Ms. Ahrendt Janoff -- you probably don't remember this, but did you ask her whether perfumes and things of that nature bothered her?

A. Typically we -- again, you've got a very

small piece of sort of what an original work-up would look at. It's a several-paged document, four pages that the patient fills out and a couple pages that we fill out.

And, yes, in that list of things that they're asked to complete are, you know: List what bothers you. And perfumes and cigarette smoke and all that is listed on there for the patient to check off.

And so that's asked of the patient to record on their own before they come to the office and then in the office those questions are asked again and recorded on our intake sheet, but it's not --

Q. Not here?

A. It's not on the summary sheet, no.

Q. This may rinse nose if dry with the various products you mentioned --

A. Right.

Q. -- if she were to fly again, I presume if the plane had very, very low humidity that she could well experience again a dry nose?

A. Certainly.

Q. Okay. So did you give her any recommendations on how to deal with a very dry --

the very dry air on board airplanes?

A. Well, unfortunately the only recommendation that works is to stay well hydrated just generally but also to use one of the saline rinses when your nose is bothering you. It helps clear mucous and it also is somewhat soothing to the lining of the nose.

Q. I noticed you have some information on a Web site, correct?

A. We have a very small Web site for our clinical research organization, yes.

Q. And I noticed that one of the things that is indicated on your Web site about: When people develop allergies, if you remember that?

A. Talk to me about what you saw because --

Q. I just noticed something on your Web site that said that: Adults oftentimes develop allergies between the ages of 25 and 30?

A. That's correct.

Q. Why is that?

A. We don't understand really why people develop allergies later in life, if you will. About 50 percent of the time allergies present, you know, before the age of ten, but about 50 percent of the time, they occur after adolescence,

and why that is, we don't understand it.

It seems to be a combination of factors, exposures, possibly associated infections during times of allergin exposure. There are a variety of theories about it, but nothing has really been proven.

Q. Is -- Mr. Williams asked you about a genetic relationship between allergies and individuals?

A. Yes.

Q. And you indicated about half the time there seems to be a genetic history?

A. There is. I mean the data is a little closer than that. If you have one parent who has an allergic tendency, your likelihood of having allergies is somewhere between 25 to 30 percent. If you have two parents, it goes up to around 50 percent likelihood.

Again, depending on what you're exposed to, when you're exposed to really determines what you become allergic to and when, but your likelihood goes ways up as your family history of allergy goes up.

Q. I don't think I have any other questions, Doctor. Thank you.

A. Thank you.

MR. WILLIAMS: Neil?

MR. KODSI: Give me one second. I don't think I have any either.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Doctor, let me just follow up on one question then. Did she give you a history of developing this problem as a result of dry air?

A. Mr. Williams, I don't -- since I don't have my complete history sheet, I really have no further information other than what I read to you.

Q. Okay. I didn't mean to ask a question that puts you at a disadvantage but I'm just trying to clarify something Mr. Reilly said concerning or during the cross-examination. Would it by fair to say that whatever history she gave you on that date, that's all you have and you know at the present time?

A. That's correct.

Q. All right. Let me just ask you this last question, Doctor. If she were to return to flying back then after you saw her and she was exposed to an aircraft cabin full of smoke, would

it be reasonable to assume that she would develop this vasomotor rhinitis again?

MR. REILLY: I object to the question as being beyond the scope of cross-examination and beyond what you've indicated this person is, which is not a retained expert of yours.

THE WITNESS: So do you want me to answer the question?

Q. (BY MR. WILLIAMS) You can answer the question, Doctor.

A. More than likely the symptoms of her rhinitis would return, you know, in that condition, in the exposure in a smoky bar or a restaurant or with exposure to extremely cold air, the symptoms will return. So the -- to answer your question, yes, you could expect that.

MR. WILLIAMS: Okay. I don't have any other questions for you, Doctor. I want to thank you very much for taking time out to have this deposition.

(Whereupon, the playing of the videotaped deposition of Dr. Lumry was concluded.)

THE COURT: Thank you very much. That

concludes the testimony for today. We begin tomorrow at 10:45, so be outside the courtroom at 10:45 and leave all the documents behind. Have a good evening, everyone.

THE BAILIFF: Rise for the jury, please.

(The jury left the courtroom.)

THE COURT: Thank you. You may be seated. I have the designations -- the plaintiff's designations, the defendants' objections and the defendants' counter-designations as to the testimony of Carol Wurmlinger.

Is the plaintiff going to be objecting to any of the defendants' counter-designations?

MR. WILLIAMS: Yes, Judge. I have them written out, Judge. I don't have them typed up.

THE COURT: I don't care if they're typed or not, just as long as I can read it.

MR. WILLIAMS: You might not be able to, that's the problem. I have the worst handwriting in the world. If I could make a copy of this right now, Judge, somehow, I

could --

THE COURT: I can have Gary make a copy of it. Gary.

THE BAILIFF: Yes.

THE COURT: Actually do you have a copy of it? Does defense have it.

MR. WILLIAMS: No, this is it right here (indicating).

THE COURT: So I'll have Gary make five copies of it so that each one of them have it as well.

MR. HUNTER: That's pretty good. You'll be able to read this.

MR. WILLIAMS: This is pretty bad.

THE COURT: Gary, make five copies of this.

THE BAILIFF: Where is it?

MR. WILLIAMS: Here (indicating).

MR. REILLY: Judge, I'm --

THE COURT: Wait. Let me just also see, are there any -- are there going to be any objections as to the designations of Dr. Stroschein's deposition taken on June the 25th? You're going to be giving me those objections?

MR. REILLY: That's what I rose to say I expect them to arrive any minute.

THE COURT: All right. So I can wait for that.

MR. REILLY: For some reason, if they're not --

THE COURT: So I'm going to be here. I have a hearing starting at 6, so I surely will be here.

MR. REILLY: They will come to you before you leave tonight, I can assure you.

THE COURT: All right.

Okay. These are for the clerk.

(Hands documents.)

All right. Now we had a couple of issues that we wanted to resolve this evening, correct? No?

MR. REILLY: (Shakes head from side to side.).

Wait a minute. I don't know.

MR. KODSI: Leone, if they're going to bring that up first, we need to do that.

MR. HUNTER: Judge, one issue we can bring up, and this is a change of strategy on my part that has come about after I listened

to voir dire examination which went on, on behalf of the defendant, seemingly forever on the issue of personal responsibility.

I had not earlier intended to offer the plaintiff's testimony concerning what efforts she did to change the environment in which she worked.

However, in light of the fact that the major defense in this case seems to be her personal responsibility and that she was derelict in that respect, I do want to offer evidence that she was an advocate for cleaning up her work environment, that she became active in the union to try to alleviate the smoky conditions of flight attendants, that she lobbied to improve the environment.

And that her efforts to clean up the environment in which she and her fellow flight attendants worked went so far as to traveling to Washington and testifying in front of Congress.

And I have no alternative in light of the defense in this case but to offer to rebut the defense that she was irresponsible

concerning her personal work environment to show that, in fact, she was not irresponsible, that she was most responsible and she did everything that she could do within the system to make it a better work environment for her and her fellow flight attendants.

THE COURT: Response by defense.

MR. MOLONY: Yes, Your Honor. First of all, it's interesting that I rise to again argue the issue that we've argued previously, and that is that the testimony before Congress doesn't bear any probative value in the issues that are in this case.

The fact that she participated there on behalf of some other group, she was not -- as her testimony bore out on deposition, appearing before Congress as a flight attendant.

She was there for some other -- for some group of nonsmokers that have nothing directly to do with flight attendants, but, Your Honor, this catches me by surprise.

What I'd like to do, if the Court is inclined to hear argument again, I would like

to revisit the motion and collect my thoughts because we have argued this to you. You have ruled.

And there are a variety of bases that I would like to advance to the Court before Ms. Janoff is called to the stand.

She is not, to my understanding, being called tomorrow, and what I'd like to do, if the Court wants to hear further argument and again address this issue, I don't think it appropriate obviously because of, you know, the issues that are in this case have been known to be in this case for quite some time.

They knew what our defense would be, and now here in the midstream, they're trying to change the game and to get this court to rule again on an issue that has already been disposed of.

We can address every one of these issues. I don't think it's appropriate but if the Court is inclined to hear it, I'd like to think about it for a few minutes before being called upon to express our position in full.

THE COURT: I am inclined to rehear it. As I expressed before the trial when we were hearing all of these motions, I was having to rule on all of the motions in a vacuum without really understanding the case, understanding the defenses, understanding the testimony, and based upon the questionnaire in voir dire as well as the opening, there certainly has been an attempt to place the blame on Ms. Janoff's condition on her own failure to react to a medical condition.

So I don't recall what her testimony was before Congress. I don't know whether we really got into the issue of what the substance of that testimony was or the motivation or purpose of the testimony. I certainly will give you time to be able to argue it to the Court.

When do you anticipate that you would be calling Ms. Janoff?

MR. HUNTER: Wednesday, probably late or maybe Thursday.

THE COURT: We aren't going to have a lot of time tomorrow to argue it. If she didn't testify on Wednesday, we could take

that up Wednesday night with the other arguments that we already have planned.

If you think there's a good likelihood that she will testify on Wednesday, we have to address it at some point tomorrow then.

MR. WILLIAMS: There won't -- we won't be able to get to her Wednesday, Judge. We're starting tomorrow at 10:30, 10:45?

THE COURT: 10:45.

MR. WILLIAMS: We have Dr. Stroschein first. She's about three hours.

THE COURT: I wish you would have told me that. I would have brought the jury in early in the morning. They would have been here at 9 and could have started that before my motion calendar. I didn't realize you had deposition testimony.

MR. WILLIAMS: I'm sorry, Judge.

THE COURT: We have all their numbers, correct, Gary?

THE BAILIFF: I have a beeper on one.

THE COURT: But we have numbers for all of them?

THE BAILIFF: Uh-huh.

THE COURT: What I'd like to do then is

begin earlier in the morning because there's no reason to wait that late if you're going to start with deposition testimony. We could start at 9, 9:15, whatever.

I'll be here. I don't have my motion calendar until 9:30 so I could certainly be here to come in and seat the jury and begin. What time do you want to start, 9:15?

MR. HUNTER: 9 would be fine with us. The earlier the better for us.

MR. MOLONY: We'll be here at 9.

MR. REILLY: What happens if the person on the beeper though --

THE BAILIFF: Suppose I can't get ahold of one?

MR. MOLONY: What if his tower is down again?

MR. WILLIAMS: You may have to rule on the June 25th depo.

MR. HUNTER: We could read that later.

MR. WILLIAMS: Okay.

THE COURT: The June 25th depo. All I have are your -- I have --

MR. WILLIAMS: That's.

MR. MOLONY: That's a different witness,

Your Honor.

MR. WILLIAMS: That's Wurmlinger.

THE COURT: Oh, have you given me the objections.

MR. REILLY: That's what you're waiting on, for the objections, Your Honor.

THE COURT: All right. Well, that I can hand to you first thing in the morning, but you will need that to be able to prepare the videotape, correct?

MR. WILLIAMS: No, no, the videotape has already been decided. Your Honor has already decided on the videotape. The June 25th is nonvideo.

THE COURT: All right. So it will be easier to take out the portions that I sustain objections to.

MR. WILLIAMS: Yes.

MR. REILLY: My only concern about starting earlier is if we only get some of them and we don't have all the jurors here.

THE COURT: What I'd like to be able to do is perhaps have Gary call them and if he's able to reach them all and they're going to be here, then he won't contact you, but if

he's unable to reach any of them, then he'll contact all of you.

So you're going to have to give him numbers. So if you don't hear from him, he was able to reach them all and if you do hear from him, that will mean that we can't begin until 10:45. You need to tell me this before I excuse my jurors.

MR. WILLIAMS: Yes, Judge.

THE COURT: Okay. He wants you to call him at 8:30 instead of him taking all your numbers, so you can call him at 8:30.

MR. REILLY: What is his number?

THE COURT: What's your beeper number?

THE BAILIFF: 607-3033. They've got it already.

MR. MOLONY: And, Your Honor, in terms of when we'll argue this again, that will be dictated by how far we get tomorrow. Is that essentially it?

THE COURT: How about if we have the jury come at 9:30 and we meet at 9:00 in the event that we're able -- I can still -- I still can meet with you at 9:00, but I hate to have to drag you here at 9:00 if you don't

have to be here until 10:45.

MR. WILLIAMS: I know. That drive now that school has started, that's a killer.

THE COURT: Here's what we'll do. If we're able to reach the jury, then I'll have the lawyers meet here at 9:00. I'll rule on the objections.

The jury will come at 9:30. If we're unable to reach the jury, then everybody will be here at 10:45 and I'll hand you the rulings and you can make your corrections during the lunch break.

MR. MOLONY: And the argument with regard to the reargument of the congressional testimony?

THE COURT: That doesn't have to do with Stroschein.

MR. MOLONY: That's correct.

THE COURT: And I think they've indicated they're not going to get to her -- well, you may get to her testimony now then on Wednesday if we start early in the morning.

MR. HUNTER: It's possible.

MR. WILLIAMS: Yes.

THE COURT: Then we'll have to figure out some time to do this tomorrow.

MR. WEINSTEIN: It seems to me though that calling the jurors now is going to be a problem because you have to be sure you're getting all of them so you have to go through them twice, say: Hold on if you could be there, if you, until you get the last, the sixth one, you've got to call them all back again.

THE BAILIFF: And the other problem is I only have a cell phone on one of them. The rest of them are home. It's 5:00. They won't be home until --

MR. WEINSTEIN: I think we ought to just live with what you told them.

MR. REILLY: I'll be honest, for the only time in my professional career, I agree with Mr. Weinstein.

MR. HUNTER: It could become a habit, you know.

MR. REILLY: No.

MR. WILLIAMS: Well, we're making a lot of progress, Judge. We're moving along.

MR. REILLY: Just a suggestion, I

think --

THE COURT: All right. We'll leave it at 10:45. Why don't we do that in the morning, the arguments -- the rulings and we'll make the arguments as to the plaintiff's testimony tomorrow at -- you'd still have to come here early.

MR. REILLY: That's all right.

THE COURT: Because once I get into my motion calendar at 9:30, I'm dead. So it would have to be 9:00 at any rate.

MR. REILLY: We can be here at 9, Your Honor.

THE COURT: So 9 for the lawyers, 10:45 for the jurors.

THE BAILIFF: I still may call Mr. Ramos and have him here at --

(Laughter.)

THE COURT: Okay. We'll see everybody tomorrow at 9.

MR. UPSHAW: Your Honor, just so I can make it clear for Mr. Williams to fix the Ahrendt video, there was -- I'm not sure which way you were going on one of the -- one of your rulings because the pages overlapped,

if I might.

And I have the page out just so we can be clear. You sustained it and that's colloquy, but then you overruled the colloquy, so I didn't understand.

THE COURT: That doesn't make sense, does it?

MR. UPSHAW: No, and here it is.

THE COURT: That doesn't make sense at all.

THE REPORTER: Do you want this on the record, Your Honor?

MR. UPSHAW: No.

THE REPORTER: Okay.

(Court was adjourned at or about the hour of 5:26 p.m.)